

1078

IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT.

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CENTRAL CALIFORNIA CANNERIES COMPANY,  
Appellant.

GRIFFIN & SKELLEY COMPANY,  
Appellant.

J. C. AINSLEY PACKING COMPANY,  
Appellant.

ANDERSON-BARNGROVER MANUFACTURING  
COMPANY,  
Appellant.

GOLDEN GATE PACKING COMPANY,  
Appellant. No. 2915.

J. F. PYLE & SONS, INC.,  
Appellant.

HUNT BROTHERS COMPANY,  
Appellant.

SUNLIT FRUIT COMPANY,  
Appellant,

vs.

DUNKLEY COMPANY,  
Appellee.

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**Brief on Behalf of Defendants-Appellants.**

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Solicitors and Counsel for Defendant-Appellant.



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DUNKLEY COMPANY,	Appellee.	

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BRIEF ON BEHALF OF DEFENDANTS-APPELLANTS.

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PRELIMINARY REMARKS.

These eight cases come before this Court on ap-

peals from the respective interlocutory decrees therein, of the United States District Court for the Northern District of California, granting perpetual injunctions against the further infringement of claims 1, 2, 3, 4, 5, 6, 14, 15, 16, 19, 20, 21, 22, 23, 24, 25 and 26 of United States letters patent No. 1,104,175, issued on July 21, 1914, to the appellee, Dunkley Company, as the assignee of the inventor, Samuel J. Dunkley, for "Machine for Peeling Peaches and Other Fruit."

Pursuant to the stipulation of all the parties in said eight cases, the same were tried at the same time upon the same evidence and proofs (R. 23).

For the sake of clearness and convenience, we hereafter shall refer to the appellee as the plaintiff and to all of the appellants as the defendant. The said letters patent sued on herein will be referred to as the Dunkley patent.

The defenses relied on attack the validity of said patent on various grounds, to wit: the public use of the patented invention for more than two years prior to the filing of the application for said patent; another public use of said invention prior to the date of the inventing thereof by the said Samuel J. Dunkley; and the prior inventing of said invention by another person. The question of infringement is not raised except as the same is involved in such attack on the validity of the Dunkley patent. Of course, an invalid patent cannot be infringed.

As the defenses raise the question of substantial



identity between the machine disclosed in the Dunkley patent and other machines publicly used prior to the filing of the application for such patent, we shall first consider the Dunkley machine *as described in the Dunkley patent*.

## I.

### THE DUNKLEY MACHINE.

The Dunkley machine is for peeling peaches and other fruit. In it, the peaches are first subjected to a solution such, for example, as a solution of caustic soda or lye, to disintegrate the skin and then the peaches are subjected to the action of *brushes* and sprays of water whereby the disintegrated skin is removed.

Broadly speaking, such machine embraces two separate and distinct instrumentalities, to wit: first, *the means for disintegrating the skin of the fruit*, consisting of the tank, containing the disintegrating fluid, and the carrier for conveying the fruit through such fluid, and second, *the means for removing the disintegrated skin*, consisting of an endless brush belt or carrier for brushing the fruit and at the same time conveying the same between two cylindrical rotating brushes, which both brush and rotate the same, and perforated water pipes through the perforations of which issues water, under pressure and in the form of spray, for washing the fruit.

The fact, that his machine so embraces two separate and distinct instrumentalities, is recognized by Dunkley, who says, beginning at line 121, page 2, of the Dunkley patent:

"I desire, therefore, to claim the *means* to remove the disintegrated peel *no matter how the disintegration is accomplished.*"

Beginning at line 22, page 1, of the Dunkley patent, Dunkley says, regarding his machine:

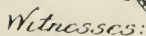
". . . it consists, in combination with a peel or skin softening, disintegrating or shriveling means or device, preferably consisting of a tank or chamber containing a heated fluid, and a heater for the same, a conveyor for automatically conveying the peaches through the skin softening, disintegrating or shriveling device and subjecting the peaches to its action for uniform and measured time, a chute or device for delivering the peaches in single file line to a *brushing* and *washing* mechanism, preferably comprising a group of three long perforated pipes for *spraying* water upon the moving line of peaches, and subjecting them to a water brushing action, an endless *brush* belt arranged between the two lower-most perforated pipes and *operating to brush the peaches* as they are rotated and to convey them along, and a pair of oppositely rotating cylindrical *brushes* operating both to rotate and *brush* the peaches, and having hollow perforated pipe cores for *spraying the rotary brushes* with water, and rotary cylindrical rubber sponge brushes, also having hollow perforated pipe cores for supplying the same with water, whereby the peaches may be very rapidly and cheaply and perfectly peeled without waste or injury."



APPLICATION FILED NOV. 29, 1904.

4 SHEETS—SHEET 3.

1,104,175.



Wm. Geiger  
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Inventor,  
Samuel J. Dunkley  
By Munday, Evans & Asenck,  
Attorneys

Beginning at line 34, page 2, of the patent, Dunkley again refers to the *brushing* means and says:

"The washing and *brushing* mechanism further, preferably, comprises an endless belt-*brush* H, traveling on pulleys H'H<sup>2</sup> between the two lowermost water pipes GG and by which the peaches are conveyed along in single file and simultaneously *brushed* as they are rotated. This washing and *brushing* mechanism further, preferably, comprises a pair of oppositely rotating cylindrical brushes KK'; each having a hollow perforated water pipe K<sup>2</sup> for flooding the brushes with water as they rotate."

*From the foregoing, it is apparent that, in the Dunkley machine, the disintegrated skin of the fruit is removed by the joint action of the brushes and water and not by the action of either one alone.*

On the opposite page is reproduced sheet 3 of the drawings of the Dunkley patent. On this sheet are shown the endless carrier or belt *brush* H on which the peaches, after leaving the lye tank, are carried along in single file between the rotating cylindrical *brushes* KK', and, also, between the perforated water pipes GG. As Dunkley says, the belt *brush* H, not only conveys the peaches but also *brushes* them, thus assisting in the removal of the disintegrated skin. It will also be noted that he says the cylindrical *brushes* operate "both to rotate and *brush the peaches*," so they also assist in the removal of the skin.

*It is to be noted that not a word is said in the*

*Dunkley patent in reference to the speed at which the brush belt or carrier H should run or the cylindrical brushes KK' should rotate, or in reference to the relative speeds at which said parts move. Anyone, attempting to practice the invention disclosed in such patent, would necessarily be compelled to use his own judgment as to the proper speed at which to convey the fruit through the brushing and washing means and as to the proper speed at which to rotate the cylindrical brushes.*

*Furthermore, there is not a word said in the Dunkley patent as to the amount of water pressure required in the operation of the Dunkley machine. The water is referred to therein as issuing from the perforated water pipes in the form of spray but not a word is said as to the amount of the pressure of such water. Therefore, anyone attempting to practice the Dunkley invention, would necessarily be compelled to use his own judgment as to the proper pressure under which to have such water.*

*Furthermore, there is not a word said in the Dunkley patent as to the strength of the disintegrating solution or the time required for it to disintegrate the skin. Those matters are also left to the judgment of anyone attempting to practice the invention.*

In our opinion, no one, possessing ordinary common sense, would experience any difficulty in practicing the Dunkley invention, as described in said patent, by reason of such patent failing to give any information



regarding the features above referred to. In other words, the judgment of anyone, attempting to practice such invention, could be relied on to determine the proper speeds, respectively, of the brush belt and of the rotating brushes; the proper amount of water *pressure*; the proper strength of the disintegrating solution and the proper time of immersion therein of the fruit.

The reason of directing the Court's attention, at this time, to such failure of the patent to furnish information regarding such details of the construction and operation of the Dunkley machine is that plaintiff attempts to differentiate said Dunkley machine from a prior art machine, designated in the record as the Vernon machine, in respect to the said details, concerning which the Dunkley patent furnishes no information.

In other words, plaintiff's differentiation of the Dunkley machine from the said Vernon machine is based solely upon features concerning which the Dunkley patent is silent! However, we hereafter shall demonstrate that the uncontradicted testimony and evidence prove that such attempted differentiation is not, in fact, true and that said machines are substantially identical even in respect to the details of operation read into the Dunkley patent by plaintiff, but concerning which said patent is silent.

It is unnecessary to consider, at any length or in detail, the numerous claims of the Dunkley patent



which are involved in this suit. The question raised by the defenses, as to the validity of said claims, is a broad one and its determination does not require any consideration of the slight differences between the several claims or any separate consideration of any one claim. In other words, one of the anticipating machines, relied on by way of defense, admittedly embodies all of the respective combinations of elements respectively covered by all of said claims and the other anticipating machine is attempted by plaintiff to be differentiated from the Dunkley machine only in respect to certain features, a consideration of which does not require any consideration of the differences between said claims.

Therefore, it will be sufficient for the purposes of the argument to merely quote, at this time, claim 1 of the Dunkley patent as an example of the general type of claims to be found therein:

Claim 1: "In a peach peeling machine, the combination with a tank or chamber for containing a fluid for softening and loosening the skins, of means which extend through the tank for subjecting the same to the action of said fluid for a uniform period of time, and a washing, spraying and brushing mechanism at the exit end of the tank for removing the softened and loosened skins, co-operating substantially as described."

It will be noted that the skin removing means, specified in the claim, involves the *joint* action of water and brushes.

## II.

## SUMMARY OF DEFENSES.

Before discussing the principles of law controlling the determination of the issues of this litigation, we shall briefly outline the defenses relied on so that the Court may perceive the particular applicability of said principles to the issues raised by such defenses.

The Dunkley patent was applied for on November 29, 1904, and issued on July 21, 1914. The validity of said patent is attacked upon the following grounds, to wit:

1. Prior to the *date of Dunkley's alleged invention* of the Dunkley machine, there was built at Pasadena, California, by G. E. Grier, of the Pasadena Canning Company, two peach peeling machines which were commenced in April, 1903, and completed before the end of July, 1903. One of these machines was put into commercial use before August 1, 1903, at Pasadena, California, by the Pasadena Canning Company and thereafter used by said company throughout the 1903 peach season and throughout every subsequent peach season up to and including the 1914 peach season. The other machine, so built in 1903, by Mr. Grier, was sold to the Eastside Canning Company, of Los Angeles, and was put into commercial operation by that company in Los Angeles at least as early as August 3, 1903, and thereafter used throughout the

1903 peach season and every subsequent peach season for many years thereafter. These two machines were identical in construction and built at the same time. One of them is shown in the eight photographs and drawing marked "Exhibit B" and attached to the stipulation of the parties filed herein (R. 23). *In view of said stipulation there can be no question raised by plaintiff as to the substantial identity of the Grier and Dunkley machines, because plaintiff bases its charge of infringement herein upon such alleged identity between them in respect to each and all the Dunkley patent claims in suit.*

In 1904, Mr. Grier built two more complete peach peeling machines, each substantially identical with each of those built in 1903. He also, in 1904, built one of his shaker devices for use in a peach peeling machine. One of said machines was sold to the Orange County Preserving Company, of Anaheim, and the other to G. H. Waters Company, of Pomona. The shaker was sold to the G. H. Waters Fruit Company of Ontario. All of said machines were sold prior to the 1904 peach season and were put into commercial use during said season which began and ended before November 29, 1904, the date of Dunkley's application. *It thus appears that, prior to the date of Dunkley's application, five Grier machines were in commercial use in California.*

2. The said G. E. Grier, of Pasadena, California,

was the original and first inventor of the invention disclosed in the Dunkley patent and, therefore, Dunkley was not such original and first inventor but, on the contrary, he surreptitiously and unjustly obtained said patent for that which, in fact, was first invented by the said Grier, who, at all times, was using reasonable diligence in adapting and perfecting the same. This defense is based upon the facts that, during the peach season of 1902, Grier conceived the invention which was promptly and with reasonable diligence embodied by him in the two machines commenced in April, 1903, and completed and ready for use before the 1903 peach season. This defense is *separate and distinct* from that referred to in paragraph 1, although it is sustained *in part* by proof of all the facts relating to the defense of paragraph 1.

3. *More than two years prior to November 29, 1904, the date of the Dunkley application*, at the cannery of the California Fruit Cannery Association in Fresno, California, there was publicly, commercially and practically used, during the months of July, August and September, 1902, a peach peeling machine, known as the Vernon machine and, in all substantial respects, identical with the Dunkley machine disclosed in said patent. Prior to the 1903 peach season, said Association built three more Vernon machines, each of a capacity larger than the 1902 machine. One of these was installed in the Los Angeles plant of the

Association and was there used during the 1903 peach season under the superintendency of E. H. Kennedy. *It thus appears that, prior to the date of Dunkley's application, four Vernon machines had been built and were in commercial use in California.*

The Vernon machine was practically a duplication of the machine described in the Dunkley patent. It embraced a tank for containing the disintegrating solution of lye or caustic soda through which the peaches were automatically conveyed and a skin removing means consisting of an endless carrier belt for conveying the peaches between two rotating brushes and a perforated water pipe located above the endless carrier belt and from the perforations of which issued water *under pressure and in the form of spray* which played on the peaches on the carrier belt. One of the principal differences between the Vernon and Dunkley machines is that, in the Dunkley machine, the carrier belt H is a *brush belt* for *brushing* the peaches as well as conveying them, whereas, in the Vernon machine, the carrier belt was a leather belt serving simply to convey the peaches. By reason of such provision, in the Dunkley machine, of said *brushing* surface in addition to the *brushing* surface found in the Vernon machine, it is apparent that, in the Dunkley machine the action of *brushes* is more relied on, then in the Vernon machine, as a means of removing the disintegrated skin.

In paragraph 16 of defendants' answer (R. 11) an-

other defense is set up but the same will be discussed by us only so far as the facts, constituting the same, are significant in respect to plaintiff's attack on the defense based upon the prior use of the anticipating Vernon machine. Briefly, said fourth defense is, as follows:

4. That plaintiff does not come into court with clean hands but, on the contrary, has been guilty of acts of such an iniquitous character as to disentitle it to any relief in a court of equity, said acts being as follows: That plaintiff knew of the two years' prior public use at Fresno, California, of the anticipating Vernon machine by the California Fruit Canners Association and, for the purpose of making it as difficult as possible for any defendant to prove such use by way of defense to a suit brought for the infringement of the Dunkley patent, issued a *free license* under said patent for the life thereof to the California Fruit Canners Association with the understanding that said Association should align itself with plaintiff and put obstacles in the way of anyone attempting to prove such prior use; and that said Association pursued a course of action in accordance with such understanding.



## III.

RULES OF LAW APPLICABLE TO A DETERMINATION OF THE  
QUESTIONS INVOLVED HEREIN.

## I. PUBLIC USE.

Section 4886 of the Revised Statutes provides that an invention, in order to be patentable, must not have been in public use or on sale in this country for more than two years prior to the application for the patent.

Section 4920 of the Revised Statutes provides, among other things, as follows:

"In any action for infringement, the defendant may plead the general issue, and, having given notice in writing to the plaintiff or his attorney thirty days before, may prove on trial any one or more of the following special matters:

"Fifth. That it has been in public use or on sale in this country for more than two years before his application for a patent or had been abandoned to the public."

In *Egbert v. Lippmare*, 104 U. S., 333, the Supreme Court said:

"We observe, in the first place, that to constitute the public use of an invention, it is not necessary that more than one of the patented articles should be publicly used. The use of a great number may tend to strengthen the proof, but one well-defined case of such use is just as effectual to annul the patent as many. *McClurg v. Kingsland*, 1 How., 202; *Consolidated Fruit Jar Co. v. Wright*, 94



U. S., 92; *Pitts v. Hall*, 2 Blatchf., 229. For instance, if the inventor of a mower, a printing-press, or a railway car makes and sells only one of the articles invented by him, and allows the vendee to use it for two years, without restriction or limitation, the use is just as public as if he had sold and allowed the use of a great number.

"We remark, secondly, that, whether the use of an invention is public or private does not necessarily depend upon the number of persons to whom its use is known. If an inventor, having made his device, gives or sells it to another, to be used by the donee or vendee, without limitation or restriction, or injunction of secrecy, and it is so used, such use is public, even though the use and knowledge of the use may be confined to one person."

## 2. BURDEN OF PROOF.

### (a) *Presumptions of Law.*

A Patent is *prima facie* valid.

*Bates v. Coe*, 98 U. S., 31.

"In *Bates v. Coe*, 98 U. S., 31, Mr. Justice Clifford, speaking for the Court, said:

"The *presumption* in respect to the invention described in the patent in suit, if it is accompanied by application for the same, is *that it was made at the time the application was filed*; and the complainant or defendant may, if he can, introduce proofs to show that it was made at a much earlier date.'

"In the *Barbed Wire Patent Case*, 143 U. S., 275, the Court, in considering the evidence on the question of priority of invention, assumed that the date of the application of the patent in suit was the date

of the invention; and the same assumption was made in *Miller v. Eagle Manufacturing Company*, 151 U. S., 186."

*Automatic Weighing Machine Co., v. Pneumatic Scale Corporation*, 166 Fed., 294.

The parties hereto have stipulated that the date of application appearing on the copy of each patent introduced in evidence, shall be deemed proof of such filing date. (R. 21.)

In view of the foregoing authorities, the Dunkley patent, when introduced in evidence herein, was presumed, at that stage of the trial proceedings herein, to be valid, and the invention disclosed therein was presumed to have been made on November 29, 1904, *but was not presumed to have been made at any earlier date.*

There is no presumption of law or of fact that, prior to November 29, 1904, Dunkley did anything. In order to secure his patent, it was not necessary for Dunkley to first reduce his invention to practice or make a model of it or do anything other than merely file his application, which was filed on November 29, 1904.

"At the same time we have the equally well settled rule that an invention need not be perfected and adapted to use, or reduced to practice, in order to obtain a valid patent, since no such condition is contained in the statutes."

*Automatic Co. v. Pneumatic Corporation,  
supra.*

It is obvious, therefore, that the presumption that a patent is valid in no way fortifies or strengthens any proof of any acts of the patentee prior to the filing of his application. Proof of such prior and antecedent acts must be tested and stand on its own intrinsic merits unfortified by any presumptions of law or of fact. *The law does not presume the patentee did anything prior to filing his application.*

"The patent being anticipated, if the date of application be taken as the date of invention, the burden rests upon the complainant to satisfy the court that the invention was made at an earlier date. *There is no presumption in favor of such a patent.* The burden which rested upon the defendant in the first instance has been transferred to the complainant and it must furnish the court with *convincing proof that the anticipation has been anticipated.*"

*Westinghouse Co. v. Saranac Co.*, 108 Fed.,  
222.

In *Michigan Cent. R. Co. v. Consolidated Car-Heating Co.*, 67 Fed., 121, the Circuit Court of Appeals for the Sixth Circuit, through Judge Severens, Judges Taft and Lurton concurring, said:

"The evidence shows that the device, as patented, has been in public use for some time prior to the date of his application. If it be permissible, as contended, to maintain his patent upon

evidence, dehors the proceedings in the patent office, that he has made the invention at an earlier date *than is to be presumed from his application and patent*, so as to carry it back to ante-date the public use, the proof should be clear and unequivocal that he was the original inventor. *Eagleton Manufacturing Co. v. West Bradley & Cary Manufacturing Co.*, 2 Fed., 774, 777; Rob. Pat., Sec. 1026, note 14, and cases cited. There is much evidence in this record upon that subject. Without here going into detail, it suffices to say that we have serious doubt whether Cody was the original inventor of the device represented by this combination of his patent. *If the evidence in its favor were fortified by the presumption of validity afforded by the patent in ordinary cases*, we might think it right that that should turn the scale, and that this claim in the patent should be held valid. But the presumption does not apply in such circumstances, and the burden of proof is on the other side. We do not think it is sustained."

We wish to particularly emphasize the principle announced in the foregoing decision because said principle differentiates this case from the ordinary case involving merely a consideration of the sufficiency of a defendant's proof of a prior use. In this case, the sufficiency of plaintiff's proof, of what the patentee Dunkley did prior to November 29, 1904, must be considered by the Court. Further, said proof must be tested by an application of precisely the same rules that are applied in testing the sufficiency of proof of a prior use. Defendant's proof as to what Grier did in 1902 and in 1903 and the plaintiff's proof as to what

the patentee Dunkley did prior to November 29, 1904, stand, in the eyes of the law, on a plane of equality. The sufficiency of each must be determined by its own intrinsic merits, unfortified by any presumption of law or of fact. *As said by Judge Severens, the presumption of validity does not apply to or fortify proof of what the patentee did prior to filing his application.*

(b) *Shifting of Burden of Proof.*

The *prima facie* validity of the Dunkley patent was destroyed by:

1st. Introduction in evidence, as defendant's exhibit A (R. 97) of letters patent No. 864,944 issued on September 3, 1907, to H. A. Beekhuis, *upon his application filed on May 25, 1904.*

2nd. Proof of the public use of the Grier machine by the Pasadena Canning Company in July, 1903, and by the Eastside Canning Company as early as August 3, 1903, or more than a year prior to November 29, 1904, the filing date of the Dunkley application. The sufficiency of said proof was not seriously questioned or attacked by plaintiff in the lower Court and that Court's opinion herein (R. 696) apparently gives full credence to such proof. As before stated, the substantial identity between the Dunkley and Grier machines is admitted by plaintiff and it bases its charge of infringement herein upon such identity. (R. 23.)

The Beekhuis patent (R. 748) admittedly discloses

one of the two instrumentalities comprising the Dunkley machine, to-wit: "*Means for removing the previously disintegrated skin.*" Beekhuis refers to the initial subjection of the fruit to a caustic soda solution to disintegrate the skin thereon, but he does *not* disclose any *means or devices*, such as Dunkley's lye-tank having a conveyor running therethrough, whereby the fruit can be so treated with such a solution. In other words, the Beekhuis patent fails to disclose one of the two instrumentalities comprising the Dunkley machine, to wit: *means for disintegrating the skin*. In his patent, beginning at line 24, page 1 thereof, Beekhuis says:

"My invention has, therefore, for its object the removal of the *previously* disintegrated skin of the fruit. . . ."

It is apparent, therefore, that Beekhuis, like Dunkley, perceived that the skin *disintegrating means or instrumentality* had no necessary connection with the *means for removing the disintegrated skin*, but, unlike Dunkley, Beekhuis failed to disclose any such disintegrating means. We therefore find that all the claims in the Beekhuis patent respectively cover means for removing the *previously* disintegrated skin. The words, "*previously disintegrated*," appear in every such claim because, *not having shown any disintegrating means*, Beekhuis was not entitled to make any such means an element of any of his claims.



The fact, that said Beekhuis patent contains no claim calling for such a "*skin disintegrating means*" or "*lye-tank*," as an element thereof, will be hereafter referred to when we discuss the excuse given herein by the inventor, S. J. Dunkley, and by his son, Melville Dunkley, for testifying in this case that the first model machine, embodying the Dunkley invention, was made in 1902, notwithstanding the fact that in February, 1910, *they both testified, in an interference proceeding between said Beekhuis patent and the then pending application, upon which the Dunkley patent was afterwards granted, that said model was made in 1903.*

The Beekhuis means for removing the *previously* disintegrated skin, consists of a flat screen mounted on spring arms and adapted to be moved back and forth with a jerky, shaking movement which has the effect of not only agitating, shaking and dancing the peaches fed on to the surface thereof, but of advancing the peaches from the feed end to the discharge end of such shaker device. Above and below such shaker screen, are located perforated water pipes from which issues water under pressure and in the form of jets or spray, for spraying the peaches on the screen, and thereby removing the previously disintegrated skin.

The said Beekhuis patent was applied for on May 25, 1904, *more than six months prior to Dunkley's application date, which was November 29, 1904.* In paragraph 17 of defendant's answer (R. 13), it is



pleaded that Beekhuis was the original and first inventor of said Dunkley invention. Under the authorities above referred to, Beekhuis is conclusively presumed to have made his invention at least as early as the said date of his application. Therefore, by introducing in evidence the Beekhuis patent, defendant proved he made the invention, disclosed therein, more than six months prior to the date of Dunkley's application, thus destroying the prima facie validity of the Dunkley patent in respect to those claims thereof covering alone and separately the "*skin removing means*," and making it necessary for plaintiff to attempt to prove that Dunkley made his invention, comprising said means, prior to May 25, 1904. In the absence of any such proof on the part of plaintiff, the Court necessarily would be compelled to adjudge Beekhuis the prior inventor and the Dunkley patent therefore invalid in respect to such claims thereof. In view of the foregoing, it is obvious that, upon the introduction in evidence of the Beekhuis patent, the burden of proof shifted to the plaintiff to prove Dunkley made his invention, comprising said skin removing means, prior to May 25, 1904, *and there is no presumption of law or of fact that Dunkley did make such invention prior to May 25, 1904, or at any other time prior to November 29, 1904, the filing date of his application.*

In attempting to carry Dunkley's date of invention back of the Beekhuis filing date, it is evident that

plaintiff is attempting to invalidate the Beekhuis patent, which is also *prima facie* valid. This fact merely emphasizes the proposition, heretofore stated, that plaintiff's proof of Dunkley's date of invention and defendant's proof of Grier's date of invention must be tested by the same rules, must be viewed from the same standpoint and must be given equal consideration, each standing or falling on its own intrinsic merits, unsupported and unfortified by any presumption of law or of fact. The old saying that "*What is sauce for the goose, is sauce for the gander*" is particularly pertinent to a consideration of such proofs of plaintiff and of defendant.

We have heretofore referred to the testimony of the inventor, Samuel J. Dunkley, and of his son, Melville Dunkley, in the interference proceeding between the Beekhuis patent and the then pending application for the Dunkley patent in suit. It will be necessary to consider the nature of said interference, because such testimony therein is inconsistent with and contradicts their testimony in this case in respect to the most vital point of the whole history of the Dunkley invention, to wit: *the date of the building of the first model machine embodying the Dunkley invention*. Furthermore, the facts of said interference proceeding are significant in respect to plaintiff's theories as to the mode of operation of the Dunkley machine.

By referring to the file wrapper of the Dunkley patent, defendant's exhibit "B" (R. 759) and to paper

13 thereof (R. 822), it will be seen that on December 8, 1908, more than four years after the filing of the Dunkley application on November 29, 1904, Dunkley amended his application by inserting therein claims 14, 15, 16, 18, 19, 20, 21, 22, 23 and 24 of the Beekhuis patent, which had been previously issued on September 3, 1907. As a result of such belated amendment, the said interference was declared by the patent office on July 13, 1909. (R. 831.) The issues or counts of the interference were finally narrowed down to the subject matter of the Beekhuis claims 16, 18, 19 and 20. The final outcome of such interference was a decision in Dunkley's favor by the Court of Appeals for the District of Columbia, and we, therefore, find repeated in the Dunkley patent, as claims 19, 20, 21 and 22 thereof, said claims 16, 18, 19 and 20 of the Beekhuis patent.

Said Dunkley claims, which are some of those involved in this suit, read as follows:

"19. In an apparatus for treating fruit such as peaches, means for removing *previously* disintegrated skin from the fruit, including a support for the fruit, means for effecting a change of position of the fruit on said support, and means for directing peeling water jets upon said fruit.

"20. In an apparatus for removing the *previously* disintegrated skin from fruit, the combination with means for supporting and advancing the fruit of means for directing a peeling water jet upon said fruit as it advances.

"21. In an apparatus for removing the *pre-*

*viously* disintegrated skin from fruit, the combination with means for supporting and advancing the fruit, of means for directing peeling jets of water at intervals upon said fruit as it advances.

"22. In an apparatus for removing the *previously* disintegrated skin from fruit, the combination with means for supporting and advancing the fruit, of means for directing peeling jets of water at intervals upon said fruit from above and below as it advances."

The said decision, of the Court of Appeals for the District of Columbia in Dunkley's favor, in no way affects the situation in this case. The opinion of said Court was not offered in evidence, but was annexed to one of the briefs filed by plaintiff in the lower Court. It is, however, reported at page 267 of the Patent Office Gazette of May 6, 1913, and a copy thereof will be found at the end of this brief.

Said decision, on its face, shows that only one point was considered, to wit: Whether or not Dunkley was entitled to make claims calling for "*peeling jets*," in view of the fact that, in his application, as filed on November 29, 1904 (R. 762), and as prosecuted until after the time he saw the Beekhuis patent, Dunkley had not used the term "*peeling jet*" or "*peeling spray*" or any equivalent term, and was obviously emphasizing the fact that the *rotating brushes* and the *belt brush*, in his machine, were the *efficient means* for removing the disintegrated skin. Said decision shows that the Examiner of Interferences and the Commissioner of Patents each decided that Dunkley was

not entitled to claim the use of "*water jets*" as one of the means for removing the skin, because there was not, in his application, sufficient disclosure of such mode of operation.

As stated in said decision, but one issue was presented. Throughout the prosecution of such interference, the only real question considered or involved was whether or not Dunkley was entitled to insert, in his application, the Beekhuis patent claims calling for "*peeling jets*." Dunkley's story as to conceiving a "*brush machine*" in August, 1902, making drawings thereof in September, 1902, and making such a "*brush machine*" in July, 1903, was not attacked or even disputed; throughout said interference, said story was assumed to be true. In support of the foregoing statement, we shall go outside the record and quote from the brief filed by Messrs. Chappell and Earl, before the Commissioner of Patents, as follows:

"First, that Dunkley had produced his machine long before Beekhuis' conception. That has already been decided by the Examiner-of-Interferences and by the full membership of the Board of Examiners-in-Chief. *In fact it could not be decided otherwise without completely overruling the undisputed testimony.*"

From the foregoing quotation, it is apparent that the said story of Dunkley was "*undisputed*." In other words, Beekhuis' attorneys, throughout the interference proceeding, assumed the story of Dunkley to be

true in regard to his conceiving and making a "brush machine," but they contended that, in such "*brush machine*" the water spray was not *the* means for removing the disintegrated skin or peel. In that regard, it is to be noted that the Court of Appeals for the District of Columbia expressly decided that, in the Dunkley machine, the water spray or jets were not *the* means or *only* means of removing the skin, but that the same merely co-operated with the brushes in performing such function. On such point, that Court states:

"But let it be conceded that Dunkley was not fully aware of the effective action of the jets of water and *relied chiefly upon the action of the brushes to remove the skin*; and on the other hand that Beekhuis relied chiefly on the water jets, yet the latter, as we have seen, relied upon the friction of the peaches with each other and the screen to assist in removing the skins, while the water jets had the additional function of cooling and washing the fruit. It is to be observed that none of the counts define the water jets as constituting the *sole* peeling means. The counts of the issue are satisfied by a construction in which peeling water jets *enter into the operation of removing the skins* whether they be exclusively employed to remove the skins or not. *And in neither machine as described and constructed are the water-jets shown to be the exclusive means of peeling.*"

The gist of said decision is, therefore, that the term "*water spray*," as used in the Dunkley application as originally filed, and the term "*water jets*" as used in



the Beekhuis patent, are deemed equivalent expressions; that the "*spray*," striking the peaches in the Dunkley machine, will necessarily assist in removing the skin in view of the fact that such skin has been disintegrated by the hot solution of lye, "*that is to say, cut or broken and loosened from the pulp*"; and, finally, that if such spray assists *to any extent*, in so removing the skin, *even though the brushes be chiefly relied on to perform such function*, the spray may be termed a "*peeling spray*," or, as Beekhuis called it, "*peeling jets*," and, therefore, Dunkley was entitled to insert in his application by amendment thereof, claims calling for "*peeling jets*."

In view of said decision so construing the expression "*peeling jets*" in the claims thereby allowed to be inserted in the Dunkley application, plaintiff is estopped from giving to such expression any different meaning and is estopped from asserting that the Dunkley machine, *as described and claimed in the Dunkley patent*, is one in which the peeling is done by water spray or jets and *not* by the joint action of brushes and such spray.

We have dwelt at some length upon said decision in view of the persistent and consistent efforts of opposing counsel to impress the lower Court with the idea that defendant was asking such Court to render a decision inconsistent with the findings of said Court of Appeals of the District of Columbia in regards to any matter *in dispute* before that Court. As stated

before, the story of Dunkley regarding the history of his "brush machine," *as such*, was not in dispute before that Court, and that Court was not called on to pass on the truth or falsity of said story. The truth thereof was assumed and not attacked by Beekhuis, whereas, we deny it to be true and, notwithstanding the decision of the lower Court herein, but with all due respect to that Court, *we are of the opinion that we have demonstrated said story to be false from beginning to end in respect to all the vital and material parts thereof.*

Furthermore, the said decision of the Court of Appeals is not even *res adjudicata* as between the parties to the interference; it is not a final judgment of a Court of last resort; it is not binding on this Court and it is not binding on the defendant. Furthermore, it is not even persuasive as to any matters to be decided by this Court because the only point in *dispute*, passed on by said Court, has not been raised herein by defendant.

On this point, the remarks of Judge Hawley in *Wheaton v. Kendall*, 85 Fed., 670, are pertinent:

"The Commissioner based his opinion *exclusively* upon the ground of the relations between the parties. *There is not in either of the decisions any clear-cut finding of fact that Kendall, upon the evidence, was the first inventor.*

"The decisions in the patent office are not final. The statute (Section 4915) gives to a court of equity the power to decide between interfering patents, *without any exception or limitation.*"

Of course, the Beekhuis and Dunkley patents are "*interfering patents*," because Beekhuis claims 16, 18, 19 and 20 are respectively identical with Dunkley claims 19, 20, 21 and 22.

Section 142 of *Walker on Patents*, reads as follows:

"No decision of the Commissioner of Patents or the Court of Appeals of the District of Columbia, in any interference case, is pleadable as *res adjudicata* in any action in any court; but such a decision will be followed by all the courts, unless it is shown to be wrong, by evidence which puts the points beyond a reasonable doubt. Where such a decision is made between two or more applications, a patent is granted to the inventor decided to be first, and no patent is granted to either of the others. If it is made between *an application and a patent*, and is made in favor of the application, the Commissioner will grant a patent thereon, *but he cannot recall the patent already issued*. In such a case the rival inventors may litigate their interference controversy anew, on the equity side of any United States Circuit Court which has or can acquire jurisdiction of the parties. That kind of litigation constitutes the subject of the chapter on interfering patents; the thirteenth chapter of this book. *Or the question of priority between the two inventors may be litigated afresh in any infringement suit, brought by one of them against the other.*"

That part of the above quotation, reading as follows: "but such a decision will be followed by all the Courts, unless it is shown to be wrong, by evidence which puts the point beyond reasonable doubt," is not applicable to the issues of this case, because we are not

now questioning the correctness of such decision in regards to any disputed question therein passed on. Priority of invention was *not in dispute* before the Court of Appeals *in the sense* that it is *in dispute* in this case.

The use of two Grier machines in 1903 and the use of five of said machines in 1904, prior to Dunkley's filing date, has certainly been demonstrated by defendant's proofs herein. Therefore, by reason of such proofs, the burden of proof was shifted to the plaintiff.

Finally, plaintiff's attorney, in one of their briefs filed in the lower Court after the conclusion of the trial, admitted that the burden of proof was shifted to plaintiff. In such brief, Mr. Chappell said:

"When defendant offered its first proofs as to Vernon's Fresno structures, one of which was installed at Los Angeles, and after the testimony as to Grier, *the burden of proof shifted to plaintiff to show the development of Dunkley's invention prior to the date of the application for the patent in suit.*"

(c) *Quantum of Proof Required on Plaintiff's Behalf.*

As stated before, plaintiff's burden of proving Dunkley made his invention prior to the use of the Grier machines and prior to the date of Grier's invention, is precisely the same burden that was, in the first instance, upon the defendant to prove such Grier use and such Grier date of invention.

As stated in the case of *Dey Time Register Co. v. W.*

*H. Bundy Recording Co.*, 178 Fed., 818, by the Circuit Court of Appeals for the Second Circuit, speaking through Circuit Judge LaCombe, Circuit Judges Coxe and Noyes, concurring:

"The defendant having antedated the filing of the application by record evidence so convincing that it stands conceded, the burden is upon complainant to carry the date of invention still further back by evidence *that convinces beyond any reasonable doubt*.

"The complainant's patent antedating the defendant's, it was incumbent upon them to prove beyond a reasonable doubt that theirs was the prior invention. This they have done by proof so positive that the complainant's counsel conceded on the argument that the date of their invention was January 15, 1877, eleven months prior to the filing of the complainant's application. *This date being fixed, the burden was transferred to the complainant to satisfy the court by proof as convincing as that required of the defendant that his invention preceded theirs.* The rule in such cases is very strict. It is so easy to fabricate or color evidence of prior invention, and so difficult to contradict it, that proof has been required *which does not admit of reasonable doubt.* *Thayer v. Hart* (C. C.), 20 Fed., 693.

"There is nothing in this case to suggest any fabrication or attempted coloring, but the human memory for dates is often inexact, and *it is a fair rule which lays the same burden on either side which seeks to antedate an occurrence the time of which is established by a trustworthy record.* There is no proof that any records of complainant have been lost by fire or other mischance, and, since none are produced to corroborate the contention that it had perfected the automatic ribbon



shifter earlier than September 12, 1904, we are of the opinion that the defense of prior public use by someone other than the inventor is established."

In the case of *Wheaton v. Kendall*, 85 Fed., 672, Judge Hawley, sitting in the Circuit Court for the Northern District of California, said:

"In *Thayer v. Hart*, 20 Fed., 693, the court held that, when the defendant in an infringement suit proves that he invented the patented device before the date of the plaintiff's application, the burden is transferred to the plaintiff to satisfy the court *beyond a reasonable doubt* that he first conceived the invention. In the course of the opinion, Judge Coxe said:

"*'The evidence of prior invention is usually entirely within the control of the party asserting it, and so wide is the opportunity for deception, artifice, or mistake, that the authorities are almost unanimous in holding that it must be established by proof clear, positive and unequivocal. Nothing must be left to speculation or conjecture,' and cited several authorities in support of his position.*"

We believe that the record facts herein demonstrate that the foregoing rule, requiring plaintiff to anticipate the anticipations of the Dunkley patent by proving, *beyond a reasonable doubt*, an earlier date for the making of the Dunkley invention, must have been overlooked by the lower Court. Plaintiff's proofs, on that phase of the case, will be hereafter analyzed in detail. However, it may be said, at this time, that such proofs consist of the testimony of three witnesses



regarding transactions occurring more than twelve years prior to the trial, and two of said witnesses, Samuel J. Dunkley, and his son, Melville Dunkley, were highly interested in the outcome of the litigation; that the said testimony of the two Dunkleys is inconsistent with and contradicted by their former testimony in the Dunkley-Beekhuis interference proceeding in respect to the most vital feature thereof, to wit, the year in which was built the first model machine embodying the Dunkley invention; that said Dunkleys are unable to remember or deliberately refuse to state most of the vital facts connected with the history of the Dunkley invention, thereby preventing or attempting to prevent their story being checked up by any independent investigation of the truth thereof; that the only documentary evidence, offered in corroboration of said testimony, is a letter which, on its face, refers to nothing and proves nothing material or relevant to any of the issues herein; that said testimony is inconsistent with ordinary human conduct; and, finally, said testimony is contradicted by the testimony of three disinterested witnesses in respect to the most vital features thereof, to wit: the respective dates of the building of the first Dunkley model machine and of the first Dunkley commercial machine.

It is quite certain that no Court in the land has ever declared a patent anticipated and void on any such insufficient, inconsistent, conflicting and contradicted proofs as are relied on herein by plaintiff to

prove the anticipating date of the Dunkley invention, yet the rules, controlling the amount of and nature of such proofs in support of either issue, are precisely the same.

In view of the lower Court's adverse decision herein, the foregoing statements may appear, at this time, to be most extravagant. However, we feel most confident that the same will appear to this Court, after its consideration of the record, to be thereby amply justified.

### 3. DEFENSE THAT NOT DUNKLEY BUT GRIER ORIGINAL AND FIRST INVENTOR.

#### (a) *Defense Based on Statute.*

Section 4920 of the Revised Statutes provides, among other things, that:

"In any action for infringement, the defendant may plead the general issue, and, having given notice in writing to the plaintiff or his attorney thirty days before, may prove on trial one or more of the following special matters:

"Second. That he had surreptitiously or unjustly obtained the patent for that which was in fact invented by another, who was using reasonable diligence in adapting and perfecting the same. . . .

"Fourth. That he was not the original and first inventor or discoverer of any material and substantial part of the thing patented. . . .

"And in notices as to proof of previous invention, knowledge, or use of the thing patented, the defendant shall state . . . the names and residences of the persons alleged to have invented

or to have the prior knowledge of the thing patented . . .; and if any one or more of the special matters alleged shall be found for the defendant, judgment shall be rendered for him with costs. And the like defenses may be pleaded in any suit in equity for relief against an alleged infringement, and proofs of the same may be given upon like notice in the answer of the defendant and with the like effect."

In paragraph 19 of the answer herein (R.15) it is pleaded that Dunkley was not the original and first inventor, but, on the contrary, G. E. Grier, of Pasadena, California, was the original and first inventor, and Dunkley surreptitiously and unjustly obtained his patent for that which was in fact first invented by the said Grier, who, at all times, was using reasonable diligence in adapting and perfecting the same.

On this point, it is said in Robinson on Patents, at page 150:

"Sec. 961. Third Defense: Denial That the Alleged Inventor Was the First Inventor of the Patented Art or Instrument.

"The third defense consists in a denial that the patentee or his assignor performed the inventive act producing the alleged invention at *an earlier date* than any other inventors in this country. This defense concedes that the patentee or his assignor is a true inventor of the art or article in question, but denies that he was its first inventor. It is equivalent to either one of two averments: (1) *That rival inventors had completely conceived the idea of means embodied in the invention, and were using due diligence in reducing it to practice at*

*the time when the patentee or his assignor conceived the same idea; or (2) that although the patentee or his assignor had first conceived the idea he did not use due diligence in reducing it to practice, and that in the meantime some later conceiver but more prompt reducer had perfected the invention. This defense raises the same issue which is presented in interference cases in the Patent Office and in proceedings in equity to annul a rival patent, and is sustained when the evidence establishes either one of its equivalent averments."*

It will be noted that the *date of conception* of the rival and alleged earlier inventor is expressly stated to be one of the elements to be proved in proving him to be such earlier inventor. In other words, a defendant is entitled to carry a rival inventor's *date of invention* back to his *date of conception*, provided defendant can prove due diligence was exercised by such inventor in reducing his invention to practice after having conceived the same.

In Walker on Patents, it is said, among other things:

"Sec. 440. The defenses which are pleadable in bar to an action are very numerous in the patent law, and most of them are peculiar to this branch of jurisprudence. Where the facts appear to warrant so doing, a defendant may plead:

"8. That the patentee surreptitiously or unjustly obtained the patent for that which was in fact the invention of another, who was using reasonable diligence in adapting and perfecting the same . . .

"Sec. 451. The eighth defense may be made either by the general issue accompanied by notice or by special plea. *It applies to cases where another than the patentee preceded him in the first conception of the patented thing, but did not precede him in adapting it to actual use.* If that other stopped with that conception, the validity of the patent is not affected thereby, but if he used reasonable diligence in adapting and perfecting invention so conceived, no subsequent inventor can have a valid patent, surreptitiously or unjustly obtained by him for the same invention. Such a patent is surreptitiously obtained where the patentee appropriates the idea from the first conceiver, and, exceeding him in speed, reduces the invention to proper form, and secures the patent, while the first conceiver is diligently laboring to adapt the invention to use. *Such a patent is unjustly obtained, if it is issued to a subsequent inventor, when the first conceiver is using due diligence to reduce his invention to practice. Where this defense is pleaded all its elements must be incorporated in the plea.* The allegation of unjust or surreptitious obtaining of the patent must be accompanied by an allegation that the first conceiver was at the time using reasonable diligence in adapting and perfecting the invention."

It will be noted that the said defenses, set up in paragraph 19 of the answer, provide against three possible contingencies, to wit:

1st. If Grier first conceived and first reduced to practice, he is, of course, the first inventor without regard to the question of diligence, and in such case the Dunkley patent is void.

2nd. If Grier first conceived but was second in

reducing to practice, he is still the first inventor, provided he used reasonable diligence in reducing to practice, and in such case the Dunkley patent is void.

3rd. If Grier was the second to conceive but the first to reduce to practice, he is still the first inventor, provided Dunkley did not use reasonable diligence in reducing to practice, and in such case the Dunkley patent is void.

“First Inventor. The first inventor is the one who first has a mental conception of the invention, provided he exercises diligence thereafter in adapting and perfecting it, but as against a rival claimant who first reduces the invention to practice the burden is upon the first conceiver to show diligence. The party first to reduce to practice is *prima facie* the first inventor, but the man who first conceives and in a mental sense first invents a machine, art or composition of matter may date his particular invention back to the time of its conception, if he connects the conception with its reduction to practice by reasonable diligence on his part so that they are substantially one continuous act.”

30 Cyc., 873.

(b) *Conception—Proof of.*

In the case of *Philadelphia and Trenton Railroad Co. v. Stimpson*, 39 U. S., 461, the Supreme Court said:

“The next exception is to the admission of the evidence of William A. Stimpson, Richard Caton



and George Neilson, as to certain declarations and statements, and conversations of the plaintiff, as to his invention, prior to the date of his original patent, in order to rebut the evidence of the defendants, as to the invention or use by other persons of the same contrivance, before that date. The objection is that, upon general principles, the declarations and conversations of a plaintiff are not admissible evidence in favor of his own rights. As a general rule, this is undoubtedly true. It is, however, but a general rule, and admits and requires various exceptions. There are many cases in which a party may show his declarations comport with acts in his own favor, as a part of the *res gestae*. There are other cases, again, in which his material declarations have been admitted. Thus, for example, in the case of an action for an assault and battery and wounding, it has been held that the declarations of the plaintiff, as to his internal pains, aches, injuries and symptoms, to the physician called to prescribe for him, are admissible for the purpose of showing the nature and extent of the injuries done to him. See 1 *Phillips on Evid.*, ch. 12, Sec. 1, p. 200-2 (8th ed., 1838). In many cases of inventions it is hardly possible, in any other manner, to ascertain the precise time and exact origin of the particular invention. The invention itself is an intellectual process or operation; and, like all other expressions of thought, can in many cases scarcely be made known, except by speech. The invention may be consummated and perfect, and may be susceptible of complete description in words, a month or even a year before it can be embodied in any visible form, machine or composition of matter. It might take a year to construct a steamboat, after the inventor had completely mastered all the details of his invention, and had fully explained them to all the various artisans whom he might employ

to construct the different parts of the machinery. And yet from those very details and explanations another ingenious mechanic might be able to construct the whole apparatus, and assume to himself the priority of the invention. The conversations and declarations of a patentee, *merely affirming that, at some former period, he invented that particular machine, might well be objected to.* But his conversations and declarations, stating that he had made an invention, and describing its details and explaining its operations, are properly to be deemed an assertion of his right, at that time, as an inventor, to the extent of the facts and details which he then makes known, although not of their existence at an antecedent time. In short, such conversation and declarations, coupled with a description of the nature and objects of the invention, are to be deemed a part of the *res gestae*; and legitimate evidence that the invention was then known to and claimed by him, and thus its origin may be fixed, at least, as early as that period. This view of the subject covers all the parts of the testimony of the witnesses objected to in the Circuit Court, and we are of opinion that the court were right in admitting the evidence."

If the conception of a patentee inventor can be proved by other persons testifying as to his oral disclosures to them of his invention, it is quite certain that the patentee himself is a competent witness to also testify to such oral disclosures. Furthermore, if the conception of a patentee inventor can be so proved, the conception of any inventor can be similarly proved as the law makes no distinction between the two.

Paragraphs 2 and 4 of Section 4920 of the Re-

vised Statutes, as construed by Robinson and Walker and many other authorities, entitle any inventor, *whether a patentee or not*, to carry his date of invention back to his date of conception, provided he used "reasonable diligence in adapting and perfecting the same," or, in other words, in reducing it to practice. The fact, whether or not a man is a *first inventor* does not depend upon the fact that, after reducing his invention to practice and disclosing it to the public, he does or does not apply for a patent thereon. Any inventor has a right to dedicate his invention to the public if he so desires, and the public obviously is benefited more by such a dedication than by having the inventor monopolize such invention for seventeen years by means of a patent. Therefore, it is obvious that an inventor, who patents his invention, is not entitled to more consideration than the inventor who discloses and dedicates his invention to the public without receiving, in consideration of such disclosure, a seventeen years' monopoly, or any consideration other than the public's gratitude. It is a common thing for scientists and men of the medical profession to dedicate their inventions to the public. In the case of a controversy between such a scientist, who has disclosed and dedicated his invention to the public, and a man who has secured a patent thereon, what a travesty on justice it would be for the law to prevent the scientist from carrying his date of invention back to his conception date and yet allow the patentee to

do that very thing because he preferred to secure a seventeen years' monopoly thereof in consideration of disclosing it to the public instead of disclosing it gratis!

"It is the unquestionable right of every inventor to confer gratuitously the benefits of his ingenuity upon the public, and this he may do either by express declaration or by conduct equally significant with language—such, for instance, as an acquiescence with full knowledge in the use of his invention by others."

*Kendall et al. v. Winsor*, 62 U. S., 329.

"It has not been, and, indeed, cannot be, denied that an inventor may abandon his invention, and surrender or dedicate it to the public. This inchoate right, thus gone, cannot afterwards be resumed at his pleasure, for when gifts are once made to the public in this way they become absolute."

*Shaw v. Cooper*, 32 U. S., 317.

If the first inventor has the right to disclose and dedicate his invention to the public, no subsequent inventor, merely by applying for a patent, can deprive him of such right or the public of the free use of such invention. Therefore, the first inventor is he who first conceives and, with diligence, reduces to practice, and no act of any subsequent inventor can possibly alter or affect the situation or deprive the first inventor of the right to date his invention from his date of conception.

As said by the Circuit Court of Appeals for the First Circuit, in *Automatic Weighing Machine Co. v. Pneumatic Scale Corporation, supra*:

"The law appears to be well established that a conception evidenced by disclosure, drawings, and even a model, confers no rights upon an inventor unless followed by some other act, such as actual reduction to practice, or filing an application for a patent. A conception of this character is not a complete invention under the patent laws. It may constitute an invention in a popular sense, but it does not make the inventor the 'original and first inventor' under the statutes. If it did constitute an invention under the statutes, then an inventor might stop with his drawings and disclosure, and hold the field for all time against a subsequent inventor *who has reduced his invention to practice, or who has obtained a patent*. The law will not permit this. An inventor must not stop with this stage of his invention, but he must proceed with reasonable diligence to perfect his invention, *either by actual reduction to practice, or by filing his application for a patent*.

"This rule of the patent law is both reasonable and just. *It secures to the first conceiver the right to his invention*. It is not uncommon for two persons to conceive an improvement in an existing device about the same time, and *all the law exacts of the first conceiver in order to protect him in his right to the invention is that he shall proceed with reasonable diligence to reduce the invention to practice, or to file an application for a patent in conformity with the statutes.*"

On page 7 of his brief, filed in the lower Court, opposing counsel, Mr. Chappell, said:

"In digesting this Supreme Court decision, *Webster Loom Co. v. Higgins, Macomber on Patents* says at p. 736:

"Sec. 812. Miscellaneous Holdings (Priority).

"When defendant claims to have invented the device in suit, *not having made an application for a patent*, the right of complainant to his patent is not disturbed even by priority of invention by the defendant *unless he could show more than two years' public use prior to plaintiff's application.*'

"An analysis of the decision *seems* to support this paragraph of Macomber's digest, and it is of importance here in the consideration of Grier's testimony, because Grier did not apply for a patent. The only thing of consequence, so far as Grier is concerned, would be the complete articles in use prior to the date of Dunkley's invention, unless, forsooth, he showed two years' public use before Dunkley's application, when it would not of course be material whether he was before or after Dunkley's invention."

The weak and tentative manner in which Mr. Chappell *indirectly* through Macomber, suggests the said Supreme Court decision as an authority *seemingly* in his favor, is, in itself, enough to condemn the same. It is obvious that opposing counsel prefers that Macomber should shoulder the burden of citing said decision in support of the absurd doctrine contended for. According to the quotation, the defense of *priority of invention*, by one not an applicant for a patent, cannot be maintained unless coupled with proof of two years'



prior public use of the invention in controversy. As two years' public use, prior to the application, alone is sufficient to invalidate the patent, nothing could be gained by adding to proof of such use any proof as to the identity of the party who invented the thing so publicly used. In other words, it is contended that one defense cannot be successfully maintained without proof of another defense which, by itself and alone, is sufficient in law as a complete defense! However, the decision in the case of *Webster Loom Co. v. Higgins*, 105 U. S., 580, does not announce any such doctrine, but, on the contrary, supports our contentions. In that case, one of the questions involved was whether or not Webster, the patentee, or one Davis, was the prior inventor. The Supreme Court said:

"On this point we think it very clearly made out, though we shall not go into much detail in commenting upon the evidence, that the whole substance of the invention was conceived by Webster and exhibited by him in a drawing as early as the winter of 1865-66, long before Davis entertained any idea of it. The original of this drawing is in existence, and was produced in evidence, and is well authenticated. . . .

"It is contended by the defendants that Davis had conceived the idea of using a rigid lathe with his wire bar in the early part of 1868, and that, in the model which he prepared at that time for obtaining his patent, he exhibited the same latch devised by Webster, and operated in the same way by contact with the wire-box; and that he showed to the witness Crossley, by pinning his sliding shuttle-box fast to the lathe, how it could be used

with a rigid lathe and shuttle-box. . . . But, if it were true that he did show these things in his model, and had he shown a trough instead of parallel bars; and if it were true that he regarded the idea as anything more than a possibility; and that he did, in fact, contemplate it as a perfected and practicable arrangement, so as to amount to invention,—the question would still remain whether he or Webster was the first inventor. Both may have been original inventors, but only one of them could be the first. If Davis had put the invention into practical form and operation more than two years before Webster applied for his patent, then the patent would be void by reason of prior use. *But the evidence is conclusive that he never undertook to put it into practical form until he made the Sterling loom, which was only commenced in 1870.* Webster's application for his patent was made in June, 1870. . . . *The defense of prior use for two years, therefore, is not sustained; and the question comes back to simple priority of invention.* Conceding that Davis was an original inventor, *the earliest point of time that he can be regarded as such was in the spring of 1868.* But Webster had invented it before that time, and had made a drawing of it which, in March, 1868, he exhibited and explained to Davis. An invention relating to machinery may be exhibited either in a drawing or a model, so as to lay the foundation for a claim to priority, if it be sufficiently plain to enable those skilled in the art to understand it.

“There is a great deal of evidence *pro* and *con* to which we have not adverted. It must suffice to say that we are satisfied from the examination we have given to it that Webster is entitled to the claim of being the first inventor.”

It will be noted that, before passing on the question of *priority of invention*, the Court finds that the defense of *two years' public use* is not sustained. That defense is thereupon eliminated entirely from the case. It is nowhere considered by the Court as having any relation to or bearing on the defense of *priority of invention*. The two defenses are treated as entirely distinct and separate and there is no suggestion, hint or intimation that the defense of *priority of invention* in any way depends upon proof of the defense of two years' public use. Having disposed of the defense of two years' public use, the Court says: "\* \* \* the question comes back to simple priority of invention."

In then discussing said defense of *priority of invention*, it will be noted that the Court expressly and specifically accords to Davis, *as his date of invention, the date of his conception*, to wit, the spring of 1868, notwithstanding the Court expressly finds he did not reduce it to practice until 1870. The Court then finds that Webster made the invention before the spring of 1868.

From the foregoing, it is apparent that said Supreme Court decision fully and completely supports our contention and is in exact harmony with all the other authorities cited by us. In view of said authorities, Grier's date of invention was his date of conception, and, therefore, defendant was entitled to prove said date of conception in the manner set forth by the Supreme Court in the case of *Philadelphia Co. v. Stimpson, supra*.

(c) *Diligence.*

The question of diligence never arises in a case where the first conceiver is the first to reduce to practice.

“This question of diligence in reduction to practice is never raised *except in cases where the later inventor has anticipated the earlier in the embodiment of the idea of means*. A sole inventor may occupy what time he pleases in expressing his conception in tangible materials, still, as from him alone the public must receive the benefit of the invention, to him alone belongs the recompense of the inventor, whatever delays may have occurred in its disclosure. For the same reason, if the first conceiver is also the first reducer, it is from him that the complete invention first proceeds, however slowly it has been developed in his hands; and no subsequent conceiver and reducer of the same invention can claim to have conferred upon the public any new instrument or operation.”

At this point we desire to call the Court's attention to its decision in the case of *Wilson & Willard Mfg. Co. et al. v. Bole et al.*, 227 Fed., 607. In that case, the question of priority of invention was involved so that we find therein a situation similar to the one presented herein by the defense of prior invention by Grier. In the Wilson case, this Court, speaking through Judge Rudkin, said:

“The principal question in the case is the single one: Who was the inventor of the device in question, and therefore entitled to the patent? This, of course, is largely a question of fact. . . .

"The fact that the trial court decreed in favor of the appellees on conflicting testimony is entitled to consideration; but if this court is convinced that the decree is erroneous, after giving due weight and consideration to the superior advantages possessed by the trial court, a reversal must follow."

After a detailed consideration of the testimony and proofs therein, the lower Court's decree in said case was ordered reversed.

#### IV.

#### ANALYSIS OF PROOFS RELATIVE TO THE HISTORY OF THE DUNKLEY INVENTION.

Before discussing the defenses of prior invention and of prior use by G. E. Grier, of Pasadena, California, we think it advisable to acquaint the Court with the history of the Dunkley invention. In order that the Court may appreciate the significance of and the bearing on the issues herein of the various respective dates attributed by the witnesses to the several occurrences constituting such history, we shall now briefly outline the salient facts constituting the history of the Grier invention which, as stated before, is admitted by plaintiff to be substantially identical with the Dunkley invention.

During the months of August and September, in the peach season of 1902, at Pasadena, California, G. E. Grier conceived and described to others the so-called Grier machine, which is shown in the eight

photographs thereof at pages 27 to 34, inclusive, of the Record herein. During April, 1903, the building of two of said machines was commenced and the same were completed in July, 1903. One of these was put into commercial operation in July, 1903, by the Pasadena Canning Co., and the other, at least as early as August 3, 1903, was put into commercial operation by the Eastside Canning Co. of Los Angeles. Said photographs are photographs of the Eastside Canning Co's machine. The lower Court's opinion apparently gives full credence to the proofs establishing the foregoing facts.

The foregoing history of the Grier invention having been established, at the trial, beyond a reasonable doubt, plaintiff proceeded to attempt to anticipate the said respective dates of Grier's conception, disclosure to others and reduction to practice of the Grier machine by proving the dates of Dunkley's corresponding activities. Of course, under the well established rule of law heretofore referred to, *the burden was on plaintiff to prove said activities and the respective dates thereof, beyond a reasonable doubt.*

Samuel J. Dunkley, the applicant for the Dunkley patent, is a resident of Kalamazoo, Michigan. During the years 1902, 1903 and 1904, and also before and after said period, his company, the Dunkley Canning Company, operated canning establishments at Kalamazoo and South Haven, the latter a small town near Kalamazoo and on the shore of Lake Michigan.



In order that the Court may better understand and appreciate our attack on plaintiff's proofs relating to the history of the Dunkley invention, we first shall outline briefly what we contend to be the *true* history of the events occurring in the Dunkley Company's respective establishments at South Haven and Kalamazoo, during the years 1902, 1903 and 1904. At sometime, in such period, the first Dunkley model peeling machine and the first Dunkley commercial machine were built.

#### OUTLINE OF TRUE HISTORY OF DUNKLEY INVENTION.

During the year 1902, *at its South Haven cannery*, the Dunkley Company handled only peaches, a few pears and possibly a few berries. The pear season ran from about August 15th to September 10th and the peach season, as a rule, began in August and ran until about October 10th. *The pears were always peeled by hand* but the Dunkley Company never handled many pears as "Michigan has never been much of a pear State." During 1902, all of the peaches were peeled either with hand peeling knives or with the St. Claire-Scott rotary-knives peach parers. *There were a number of small peach peeling tables* about each of which the women sat peeling peaches. Each woman had her basket of fruit at her side and, in her lap, a pan into which she dropped the pits (Melville Dunkley, R., 420-5).

During the months of July and August, 1903, at the

South Haven cannery, Stewart Campbell (one of defendant's witnesses herein and, in 1903, Superintendent of the Dunkley's South Haven establishment), with some slight assistance from William A. Brunker (another witness herein for defendant and, in 1903, an employee of the Dunkley Co.), built a peach peeling table about eighty feet long. During that year, 1903, *all the peaches, commercially peeled in such cannery, were peeled by hand or by the use of the St. Claire-Scott machines.* The women sat along either side of said long peeling table and, after peeling and pitting the peaches, placed the halves on the traveling belt running down the center of the table. This belt carried the peaches to the "filling" end of the table, where they were put in cans. The cans were then taken to the machine for putting syrup therein and afterwards taken to the seaming machines wherein tops were put on the cans. They were then carried on traveling chains or carriers through the cooker, consisting of a tank filled with hot water heated by steam coils.

During the month of August, 1903, Brunker was put to work pickling peaches with the skin thereon. After about two weeks of this work, Samuel J. Dunkley told him he would like to have the peaches peeled before being pickled. He then suggested the use of the lye process for that purpose and said *he had heard of its use in 1902 at the McEwing Cannery in South Haven.* Brunker thereafter experimented with the lye process and Dunkley, being satisfied with the experi-

ments, suggested the making of a machine for the purpose and stated he would get Campbell to make it. Campbell thereafter obtained the necessary information from Brunner regarding the lye process and proceeded to make the *first experimental model brush machine*, which was not completed *until sometime in October, 1903*, near the end of the peach season. It was then tested with a few peaches which were first subjected by Brunner to a lye solution heated in a pan on a coal oil stove in a room in the basement next to the engine room. *No lye tank was ever built for such experimental model machine*, the frame of which was offered in evidence as "Plaintiff's Exhibit No. 10" (R. 480), and of which frame a photograph was offered in evidence as "Defendant's Exhibit R" (Rec., 435). *Such model was never used commercially. It comprised only a single endless brush belt* for conveying the peaches between two cylindrical rotating brushes and perforated pipes arranged alongside thereof. As stated before, *no lye tank was built for said experimental model machine*.

Within a month or so after the first test of the experimental model machine in October, 1903, Campbell commenced work at *Kalamazoo* on the *first commercial peach-peeler* which contained *three endless brush belts*, each of which carried whole peaches between two rotary brushes. This commercial machine was completed and installed in the South Haven cannery during the month of August, 1904, and operated and

tested, *for the first time late in August, 1904.* On September 3, 1904, *before said machine was ever commercially used,* Campbell left the employ of the Dunkley Company (R., 541).

About three months after the completion and first test of such commercial machine, to wit, on November 29, 1904, Dunkley filed his application for a patent thereon. The drawings in said application, upon which was issued the Dunkley patent in suit, *were based on said commercial machine* (Melville Dunkley, R., 448).

*Prior to November 1, 1904, only two peach peeling machines were built by the Dunkley Co., to wit: the experimental model one line machine and the first commercial machine, which was a three line machine, that is, a machine having three endless brush belts, each conveying the peaches, delivered thereon, between two rotating cylindrical brushes* (M. Dunkley, R., 449; S. J. Dunkley, R., 501).

According to the foregoing outline, it will be noted that the Dunkley experimental model machine was not completed until October, 1903, more than two months after both the Grier machines had been put into regular commercial use in California; it is also to be noted that the first Dunkley commercial machine was not completed or tested until August, 1904, more than a year after the completion of and the regular commercial use of the two Grier machines in California.

DATE OF BUILDING OF DUNKLEY EXPERIMENTAL  
MODEL MACHINE.

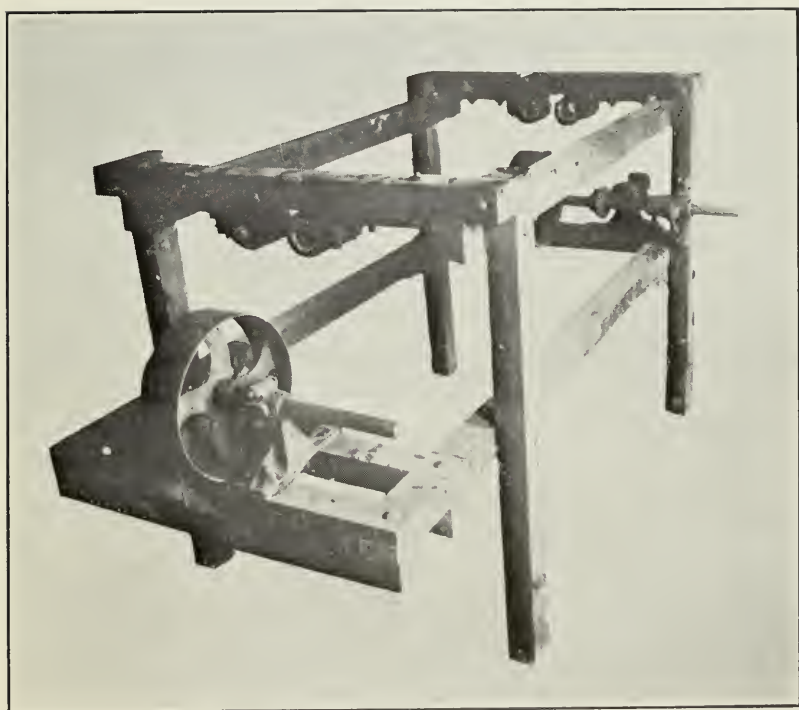
Obviously, the most vital fact in the history of the Dunkley invention is the date of the building of the first model machine embodying such invention. That date dominates the whole situation; it is the most material of all the facts necessary to be proved by plaintiff in order to anticipate the Grier anticipation. The inventor, S. J. Dunkley, contends that, *during the same month*, the invention was conceived and the model machine, Exhibit No. 10, was made (R., 479 and 495). Therefore, the date of construction of said model, for all practical purposes, fixes the date of the Dunkley invention.

If it be demonstrated that said model machine was not built until months after June 12, 1903, no weight whatever can be accorded to any of the testimony of the two Dunkleys and plaintiff's other witness, H. C. Schau, all of whom have testified herein that said model was built in 1902. If their testimony be false in respect to said material, and the most material, fact in plaintiff's case, then no credence, whatever, should be given to any of their testimony on less vital matters. To such a situation is applicable the maxim: "*Falsus in uno, falsus in omnibus.*"

The date, June 12, 1903, is above selected, because it is the date of a letter sent from New York to the Dunkley Company by William Brunker, one of de-







fendant's witnesses herein, in respect to his proposition to *thereafter* enter the Dunkley Company's employ to make fruit jams. Said letter was produced by plaintiff, during the cross-examination of Brunner, and appears at page 612 of the record. Soon after sending said letter, Brunner entered the Dunkley Company's employ at its South Haven cannery and remained there for only about four months (S. J. Dunkley, R. 506). Said period of about four months covers Brunner's whole connection with the Dunkley Company. Neither before nor after said period, was he ever at South Haven or in the Dunkley Company's employ. *The Dunkley experimental model machine was made while Brunner was at South Haven and he testified that he actually assisted in the building thereof and at the first test thereof in October, 1903.*

The wooden frame of said experimental model machine is in evidence as "Plaintiff's Exhibit No. 10" (R. 480). A photograph of said frame is in evidence as "Defendant's Exhibit R" (R. 435). A reproduction of the "Exhibit R" photograph appears on the opposite page. The frame, disclosed in such photograph, together with the brushes, spray-pipes, pulleys, gears, etc., mounted on said frame, constituted the whole experimental model. In other words, *no lye-tank was ever built for such model or embraced as a part thereof.* On this point, the patentee, S. J. Dunkley, herein said:

"Q. Was there a lye-tank built for this first experimental model machine?

"A. No." (R. 497.)

"Q. But you never built a lye-tank for this 'Plaintiff's Exhibit 10'?"

"A. For the experimental machine we never built a lye-tank." (R. 498.)

The alleged inventor of this peach peeling machine in controversy, certainly should know, if anyone knows, whether or not his first experimental machine embraced any lye-tank. He said it did not and his said testimony is absolutely true. *No lye-tank was ever built for or used as a part of said experimental model machine.*

In the interference proceeding between the Beekhuis patent and his then pending application, S. J. Dunkley, in answer to the questions asked by his attorney, F. L. Chappell, Esq., plaintiff's attorney herein, testified as follows regarding said model and the first commercial machine:

"MR. WHITE: In interference No. 30,610, between yourself and H. A. Beekhuis, did you, on February 15, 1910, make the following answers to the following questions propounded to you by Mr. F. L. Chappell, your attorney, to wit:

"'Q. 3. I call your attention to the counts in this interference, numbered 3, 4, 5 and 6, which are in the following language:

"'3. In an apparatus for treating fruit such as peaches, means for removing *previously* disintegrated skin from the fruit, including a support for the fruit, means for effecting a change of position

of the fruit on said support, and means for directing peeling water jets upon said fruit.

"4. In an apparatus for removing the *previously* disintegrated skin from fruit, the combination with means for supporting and advancing the fruit, of means for directing a peeling water jet upon said fruit as it advances.

"5. In an apparatus for removing the *previously* disintegrated skin from fruit, the combination with means for supporting and advancing the fruit, of means for directing peeling jets of water at intervals upon said fruit as it advances.

"6. In an apparatus for removing the *previously* disintegrated skin from fruit, the combination with means for supporting and advancing the fruit, of means for directing peeling jets of water at intervals upon said fruit from above and below as it advances,'

and ask you to carefully consider the said counts and state when you first conceived or thought of the structures that are recited and pointed out in these four counts?

"A. In the month of August, 1902.

"Q. 10. After conceiving of this invention in August, 1902, did you make any drawings? A. Yes, sir.

"Q. 11. When did you make the drawing, and what became of it? Are you able to produce it? A. I am not able to produce the drawing, which were pencil sketches.

"Q. 12. About when were these made, as near as you remember, and state definitely the reasons why you are not able to produce them. Indicate what became of them, in other words, as far as you know. A. As soon as I found the process was practical I made drawings right away and tried to get the matter in a concrete form, and, after I had gotten all my ideas together, I turned them over to the factory and let them put them together

and build a machine, and the machine from these drawings was built in the factory.

"Q. 13. What became of the drawings, so far as you know? A. They were turned over to M. E. Dunkley.

"Q. 14. Do you think they are in existence now? A. I couldn't say, but all the drawings that I made were generally pencil notations on any kind of paper, as I did not realize that they were of any particular value at that time.

"Q. 15. Then, as I understand you, you took no precaution to preserve them. Is that right? A. I did not, no.

"Q. 16. State whether a small model was made of the machine, or not, before a full-sized machine was made? A. Yes, there was.

"Q. 17. Kindly explain what this model was? A. This model was a one-line machine, a regular working machine.

"Q. 18. How large was it? A. In size or capacity?

"Q. 19. Both. A. Well, *it was a little over 5 or 6 feet long, about 3 feet wide* and had a capacity of from 100 bushels to 200 bushels of peaches per day.

"Q. 20. Where was this machine made and at about what time? A. *It was made in the month of July, 1903, and was put together at the factory at South Haven, Michigan.*

"Q. 21. Where was the machine used? A. *At South Haven, Michigan.*

"Q. 22. Was it used at any other place or places? A. *Not that year.*

"Q. 23. State what became of that machine, if you know? A. I think *it is over in the factory now.*

"Q. 24. Is it in working condition? A. I couldn't say as to that. The factory superintendent would know better than I would.

“Q. 25. I show you a photograph and ask you if you recognize the picture there photographed? A. Yes, this is the standard of the first machine.

“Q. 26. Is this machine one that you have described or is it a later machine? A. This is the one that I have just described.

“Q. 27. State whether there were any other machines made after this machine that you have just referred to as the model machine? A. Yes, sir; this was a one-line machine and the capacity wasn't large enough, so in September of 1903, we built the three line machine.

“Q. 28. Indicate the extent to which this *one-line* machine was used, so far as you know? A. We *first* tried it out on Georgia peaches and then worked it along until we got the *three-line* machine built, and some days the receipts of peaches were so heavy that we used both machines during that year. I don't think it was used the next year. That is referring to the small, what I call the model working machine.

“The photograph identified by the witness is offered in evidence with the request that it be marked Dunkley's machine No. 1, photograph of frame of first Dunkley machine, and the same is so received and marked.’

“Did you so testify at that time?

“A. I think I remember that well enough; yes, I testified to that.” (R. 485-489.)

It is to be noted that the four *counts* of the interference, to which Dunkley's attention was called, respectively, embrace *only* the “means for removing *previously* disintegrated skin.” In other words, no *lye-tank* or other disintegrating means is made an element of any one of said counts. *The device*, called for by



each of said counts, is one for removing skin that has been *previously* disintegrated.

It is also to be noted that Dunkley says *the model machine was made in July, 1903, and put together at the factory at South Haven*. He specifically states that "It was a little over 5 or 6 feet long, about 3 feet wide . . . ." Plaintiff's Exhibit No. 10 is the wooden frame of said model and said frame is precisely 5 feet and  $8\frac{7}{8}$  inches long and 3 feet and  $\frac{5}{8}$  inches wide, thus showing that Dunkley, in his said answer, was referring *only* to said structure and to nothing else when he said it was built in July, 1903. In other words, when Dunkley stated that said model was built in July, 1903, he referred only to the wooden frame on which were mounted the belt brush, the rotating cylindrical brushes, the perforated pipes and the necessary pulleys and gearing for operating the brushes. Said frame, with said parts mounted thereon, was *a complete device* for removing skin that had been *previously* disintegrated and such a device was the *only* one described in any one of said counts. In his said answers, Dunkley did not include, as a part of said model, any lye-tank for the very good reason that no lye-tank was built in July, 1903, or at any other time for said model machine.

It is also to be noted that Dunkley, Sr., says that said model machine was "*first tried out on Georgia peaches.*" In other words, the *first* test of said machine, according to him, was with *Georgia peaches*.

According to Melville Dunkley, "Georgia peaches came into the market at Chicago, which is usually early in *July*" (R. 418), and the Michigan peach season began in August (R. 420). Therefore, in order to contend said model was first tried out in July, it was necessary for them to say said tryout was with Georgia peaches. However, the point we wish now to emphasize is that Dunkley, Sr. states, in said interference proceeding, that the "*first*" tryout of said model was in July, 1903. In other words, he not only said said model was made in July, 1903, but he also says it was *first tried out in July, 1903*.

Regarding the date of construction of said model, Melville Dunkley testified in said Interference, as follows:

"MR. WHITE: Q. Mr. Dunkley, in Interference No. 30,610 between Samuel J. Dunkley and H. A. Beekhuis, did you testify as follows regarding a photograph, a duplicate of which has been introduced in evidence as 'Defendant's Exhibit R', to wit:

"'Q. 228. I show you a photograph and ask you if you are able to recognize the same and tell me what it is?

"'A. Yes, sir. It is a photograph of the frame and some parts of the original machine *built during the summer of 1903*, about which I have just testified.'

"THE WITNESS—Yes." (R. 441.)

It appears, therefore, that both the Dunkleys testified, in 1910, six years before the trial of this case,

that the Dunkley model machine was made in 1903. It can safely be assumed that any witnesses, called in the interference proceedings to corroborate the Dunkleys, also testified that the said model was built in 1903. None of said witnesses were called to testify herein. In their place, the witness, H. C. Schau, *who had not previously gone on record under oath*, was called to corroborate the Dunkley's *new* story to the effect that the model was built in 1902.

In order to meet the exigencies of this case, *and six years after giving his former testimony in the interference proceeding*, S. J. Dunkley testifies herein that the model machine was made and *tested* in August, 1902!

"Q. When was this plaintiff's exhibit model *first tested*?

"A. The commercial machine or the experimental?

"Q. The experimental model.

"THE COURT—This, 'Exhibit No. 10' here.

"A. Sometime in August, 1902" (R. 495).

Of course, the Dunkleys had to give some kind of an excuse for such a remarkable change in their testimony regarding the most vital fact in plaintiff's case. The real reason for such change is not difficult to fathom. Defendant had proved, by an overwhelming mass of evidence, the commencement of the two Grier machines in April, 1903, and their completion and commercial operation in July, 1903. The construc-

tion by Dunkley in July, 1903, of merely a model was not sufficient to meet the Grier evidence. Plaintiff's case was therefore lost unless the Dunkleys resorted to extreme measures and carried back the date of construction of Dunkley's first machine. Hundreds of thousands of dollars were at stake and the Dunkleys rose to the occasion. The pretended reason for such change in their testimony will now be discussed. At this point we again wish to call the Court's attention to S. J. Dunkley's testimony on cross-examination to the effect that no lye-tank was ever built for the experimental model machine (R. 497-498). On re-direct examination, he testified as follows:

"MR. CHAPPELL: In view of the quotation from the interference record, 30,610, between yourself and Mr. Beekhuis, I will ask you to please consider the 'Plaintiff's Exhibit 10,' the framework here, and state explicitly and in detail what you know about the production of that machine and when the machine was finally completed. A. *That machine was completed some time in August, 1902.*

"MR. CHAPPELL: Q. I call your attention particularly to your answer to the question 20 in the interference record, 'It was made in the month of July, 1903, and put together in the factory at South Haven, Michigan,' and ask you if that statement is inconsistent with the one you have just made? A. This places it in July; I had the completed machine, the tank and everything in combination.

"MR. CHAPPELL: Q. Your answer as to 'Exhibit No. 10' does not contemplate the presence of the tank? A. No.

"MR. CHAPPELL: To what did you refer as a structure in 1902 in your answer? A. *Just the spray end of it.*" (R. 386-7.)

The excuse given by the witness for changing his testimony presents a most amazing situation. He says no lye-tank was ever built for the model Exhibit No. 10, yet he says his interference testimony referred to the completion, in July, 1903, of the combination of both the brush-spray-pipe mechanism of "Exhibit 10" *and a lye-tank therefor!*

Melville Dunkley also advances the same remarkable excuse for changing his testimony regarding the date when Exhibit 10 was built. He, like his father, testified in the interference proceeding, that it was built in July, 1903. *Neither of them in said proceeding, even suggested, intimated, or hinted that Exhibit 10 was built in 1902; neither of them, in said proceeding, suggested, intimated or hinted that any part of the model machine was built at any time prior to July, 1903. The testimony of both of them in said interference proceeding, clearly and unequivocally meant only one thing, to wit: that the wooden frame with the brush-spray mechanism mounted thereon constituted the experimental model and that said frame and parts thereon were built in 1903.*

We shall now show that the only Dunkley mechanism involved in said interference proceeding was that comprising the brush-spray-pipes mechanism, that is, *the skin-removing means.* In other words, a lye-tank

was not included as an element in any count in said interference, and, therefore, *it was absolutely immaterial in said interference, whether Dunkley ever built a lye-tank for his peeling machine or ever used one as a part thereof.* The Beekhuis patent, as stated before, does not disclose any lye-tank and a lye-tank is not made and could not be made an element in any claim in the Beekhuis patent. Therefore, it was impossible for the Patent Office to include, in any count of the said interference, a lye-tank. Every count of an interference must necessarily disclose a combination *common to both applications* in interference or *common to the application and patent in interference.* The very basis of an interference is that the *same thing* is disclosed by each of two applicants or by an applicant and by a patentee. As the Beekhuis patent does not disclose a lye-tank as a part of the Beekhuis peeling machine and as said patent does not claim a lye-tank as part of any combination therein claimed, there could be no interference between said patent and any Dunkley claim *including a lye-tank* as an element thereof.

The counts of said interference are recited, in Question No. 3, asked Dunkley in said interference, by his attorney Mr. Chappell, and previously quoted herein.

It will be noted that a lye-tank is not made an element of any of said counts. In order to show that Mr. Dunkley's attorney, Mr. Chappell, fully appreciated said fact and, therefore, fully appreciated that



Dunkley's proof need only involve matters pertaining to the brush-spray-pipe mechanism, we shall go outside the record herein and quote as follows from Mr. Chappell's brief filed in said interference:

"The issues of the interference are in the following language, numbered and *itemized into elements*:

#### Issue No. 1.

"1. In an apparatus for treating fruit such as peaches, means for removing *previously disintegrated* skin from the fruit, including

- (1) A support for the fruit,
- (2) Means for effecting a change of position of the fruit on said support, and
- (3) Means for directing peeling water jets upon said fruit.

#### Issue No. 2.

"2. In an apparatus for removing the *previously disintegrated* skin from fruit, the combination with,

- (1) Means for supporting and advancing the fruit, of
- (2) Means for directing a peeling water jet upon said fruit as it advances.

#### Issue No. 3.

"3. In an apparatus for removing the *previously disintegrated* skin from fruit, the combination with

- (1) Means for supporting and advancing the fruit, of
- (2) Means for directing peeling jets of water at intervals upon said fruit as it advances.

## Issue No. 4.

- "4. In an apparatus for removing the *previously disintegrated* skin from fruit, the combination with
- (1) Means for supporting and advancing the fruit, of
  - (2) Means for directing peeling jets of water at intervals upon the said fruit
  - (a) from above and below as it advances."

It will be noted that Mr. Chappell fully understood the obvious fact that not one of these counts included, as an element thereof, any lye-tank or any other means for disintegrating the skin. Each count specifically calls for mechanism for removing the *previously disintegrated skin*. So far as concerns any of the structures, respectively covered by said four counts, the skin might be disintegrated by any means located at any place miles away from said structures and in no way combined therewith.

That the foregoing situation was fully appreciated is also shown by the following quotation from Dunkley's communication to the Patent Office under date of Feb. 5th, 1913, and found in the Dunkley File Wrapper (R. 836):

"The water peeling means here shown are available wherever the skin of the fruit or vegetables has been suitably disintegrated or loosened. The particular alkaline treatment is highly effective, but I am sure that this may be accomplished otherwise and clearly when the skin of fruit or vegetables is disintegrated the spray means shown will do the work of peeling the same.

"I desire, therefore, to claim the means to remove the disintegrated peel, *no matter how the disintegration is accomplished.*"

Rule 110 of the Patent Office reads as follows:

"Each party to the interference will be required to file a concise preliminary statement, under oath, on or before a date to be fixed by the office, showing the following facts:

(1) The date of the original conception of the invention set forth in the declaration of interference.

(2) The date upon which a drawing of the invention was made.

(3) The date upon which the invention was first disclosed to others.

(4) The date of the reduction to practice of the invention.

(5) A statement showing the extent of use of the invention.

(6) . . ."

It will be seen, therefore, that such a preliminary statement is, in effect, a pleading, under oath, setting forth all the ultimate facts relied on. The proofs, in the interference, must be consistent with such statement.

In his oral argument in the lower Court, plaintiff's attorney, Mr. Miller, stated:

"Now, the evidence that has been produced in that case (Beekhuis-Dunkley Interference) is the *same evidence* that has been produced here, evidence as to the date of Mr. Dunkley's conception, the date of Mr. Dunkley's application or reduc-

tion to practice, the building of his machine, and his application for a patent, including this big machine over here, this model, which was made in the fall of 1902. There is a judicial determination by the Court of last resort upon these facts, and *the finding of facts in that matter shows that this model was made in the fall of 1902, but without a lye-tank; that in the spring of 1903, the lye-tank was bought, and that in the peach season of 1903 the lye-tank was coupled up with this machine, and that this machine was put to use in actual peeling of peaches in 1903 . . .*" (R. 682).

In making the foregoing statement, opposing counsel not only went outside the record herein, but, in doing so, he grossly misstated the facts in regard to the most vital feature of plaintiff's case. In fact, the boldness with which opposing counsel incorrectly stated the law and testimony in the lower court was only exceeded by the boldness with which plaintiff's witnesses misrepresented the truth. In view of the success, with which said tactics met in the lower court, we are determined that this Court shall not be misled by our failure to meet such tactics by ourselves going outside the record herein *in order to answer such misstatements regarding the Beekhuis-Dunkley record.*

*In said interference proceeding, not a single witness even suggested or intimated that any part of said model machine or of any other peach peeling device, embodying the Dunkley invention, was made, or the making thereof commenced or such a part purchased*

*before July, 1903. The said interference record, as a whole, was not offered in evidence, although parts thereof were quoted to the two Dunkleys when on the witness stand. However, such record is in printed form and both parties have copies thereof. In view of said gross misstatement regarding said record and which, as clearly shown on the face of the lower Court's opinion, was given credence by it, we challenge opposing counsel to refer this Court to any testimony by any witness in said interference or any statement in any of the briefs filed therein by Messrs. Chappell & Earl in Dunkley's behalf, even remotely suggesting or intimating that any part of said Dunkley machine was made, commenced, bought or used, prior to July, 1903, or at any time other than during the four months period when William Bruncker was at South Haven in the employ of the Dunkley Company. In fact, Melville Dunkley testified, in said interference, that Bruncker may have actually worked on said model machine. Although his said testimony was not read into this record in the precise words used by him (R. 459), we feel justified in referring to it, in view of opposing counsel's misstatements respecting the general purport of the interference testimony. Melville Dunkley, in 1910, testified in said interference, regarding said model machine, in answer to Mr. Chappell's questions, as follows:*

"Q. 15. Who constructed the machine?

"A. The machine was built in our South Haven

factory under my direction. As to who worked upon it, I do not remember.

"Q. *Who was at work for you at the time that would have been likely to work on the machine, so far as you can remember?*

"A. A man by the name of *William Brunker*, another by the name of *Stewart Campbell*, another by the name of *Fred Brown*, any or all of them might have worked upon it."

The despicable and contemptible nature of said misstatement can be fully appreciated only when we consider that the same was used to bolster up a charge of false swearing made against honest men. Think of the audacity of opposing counsel stating, for the purpose of convincing the Court, that Campbell was a perjurer, that the Dunkley-Beekhuis record showed the building, in 1902, of the *only device* involved in said interference, to wit: the *skin-removing means* which constituted the model machine and comprised the wooden frame with the brushes and spray pipes mounted thereon! Not only did said opposing counsel make such gross misstatement once, but he repeated it as the final climax of his tirade of abuse and vituperation directed at Campbell. Opposing counsel's final words were:

"There is no difference between the testimony that was given in the interference and the testimony that was given here; the testimony is exactly the same in both cases, that is to say, that this machine, Exhibit 10, together with the complete tank making it a machine that was complete in 1903;



the letter of Clark shows that; it shows that the tank was obtained there; *but the machine without the tank was in 1902*, and the machine with the tank was in 1903, and *that is what the record shows in the interference case*, and that is exactly what the record shows here in this case." (R. 692.)

The grossness of said misstatement is also shown by the following statement of Messrs. Chappell and Earl, at page 24 of their brief, filed before the Examiner of Interferences, in said Dunkley-Beekhuis interference:

"Abraham Verhage was called as a witness. He testified to having seen the machine in operation in July, 1903. The witness indicates that *the first wooden frame* was made in July, 1903. He helped set the machine up with Campbell."

The Verhage testimony, upon which said statement was based, appears in the printed record in the Dunkley-Beekhuis record as follows:

"Q. 10. Will you indicate about the time, so near as you can remember, that the *first wooden frame was made*?

"A. *July, 1903.*

"Q. 11. What did you know about the machine in July, 1903, or did you see it or have anything to do with it?

"A. I did not have anything to do with it. I saw it but did not have anything to do with it.

"Q. 12. Where did you see it?

"A. South Haven.

"Q. 13. Any particular place there, do you remember that you saw it?

"A. I do not recollect any.

"Q. 14. At what plant was it that you saw it, that you remember?

"A. At the plant of the Dunkley Company.

"Q. 15. At what place in the plant was the machine set up?

"A. *It was first set up in the basement in the north wing.*

"Q. 16. Who set it up there, if you know?

"A. *Mr. Campbell* and myself.

"Q. 17. Did you see the machine work after it was set up?

"A. Yes, sir.

"Q. 18. Did it peel peaches successfully?

"A. Yes, sir.

"Q. 19. Please state the way in which the machine did the work, indicating *the parts of the machine*, and how *they* worked, as well as you are able and as well as you remember?

"A. Well, we had a belt with brushes and two rotary brushes, which was used as a carrier to carry the peach through and keep the peach revolving. Then, there was three perforated pipes that did the peeling, after they went through the lye process."

\* \* \*

"Q. 23. I show you a photograph, 'Dunkley's Exhibit No. 1, Photograph of Frame of First Dunkley Machine,' and ask if you are able to identify it?

"A. Yes, sir.

"Q. 24. State what it is from what you know about the subject.

"A. *It is the first frame that was built, the first machine operated.*"

It is noted that "Defendant's Exhibit R" herein, is

a reproduction of said photograph, marked in the interference as "Dunkley's Exhibit No. 1, Photograph of Frame of First Dunkley Machine."

We trust this Court will bear in mind the foregoing challenge and observe whether or not opposing counsel accept it and attempt to justify said statement, respecting the alleged similarity between the two records, by *quoting* any such testimony in the interference record or any statements in the briefs filed therein.

As before stated, the preliminary statement is a brief statement of *all* the ultimate facts relied on and the proofs must be consistent with it. Therefore, on its face, it shows, in a comprehensive manner, the *whole* case of the party filing it. For the same reason, prompting us to go outside the record to quote the testimony of Melville Dunkley and Verhage, we shall set forth a copy of Dunkley's preliminary statement in the Dunkley-Beekhuis interference, although it was not copied into the record herein. Said statement reads as follows:

*“United States Patent Office,  
Washington, D. C.”*

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In Re Interference,  
HERMANUS A. BEEKHUIS

vs.

SAMUEL J. DUNKLEY,  
For Machines for  
Peeling Fruit.

Before the Examiner  
Of Interference,  
No. 30,610.

---

State of Michigan,  
County of Kalamazoo—ss.

Samuel J. Dunkley, being first duly sworn, deposes and says that he is now a resident of the City and County of Kalamazoo, and State of Michigan; that he is a party to the Interference declared by the Commissioner of Patents on the thirteenth day of July, 1909, between claims 29, 30, 31, 32, 33, 34, 35, 36, 37 and 38 of his application for Letters Patent, filed on the 29th day of November, 1904, for Machines for Peeling Fruit, and claims 14, 15, 16, 18, 19, 20, 21, 22, 23 and 24 of patent No. 864,944, issued September 3, 1907, for Apparatus for Removing the Skin from Fruit, to Hermanus Albert Beekhuis;

Deponent further states that he conceived the invention set forth in the declaration of interference during the month of August, 1902; that the invention was *first disclosed* by him to others during during the *month of September*, 1902; that a drawing of the invention was made during the month of September, 1902; that *he made no model of the invention*; that the invention was *first embodied* in a complete working structure during

the *month of July, 1903*; that the structure made at the time was successfully operated in the City of South Haven, State of Michigan, during the month of July, 1903; that the invention was reduced to practice during the month of July, 1903, and such machine has been made use of annually during the peach canning season in the City of South Haven, since that date with changes and additions.

Further Deponent sayeth not.

SAMUEL J. DUNKLEY.

Subscribed and sworn to before me on the 4th day of September, 1909.

EVELYN ROE.

Notary Public in and for said County and State.

My commission expires July 19, 1910."

(SEAL)

In his interference proceeding testimony, previously quoted herein, Dunkley was first referred to said four counts, and then he said he conceived the invention, disclosed therein, in August, 1902; that he thereafter made drawings thereof and that in July, 1903, he made the model machine, "a regular working machine" (R. 485). In other words, he claimed a reduction to practice in July, 1903, by reason of making the model, "Exhibit 10," and, *in that month, using the same*.

The Court has knowledge of the ability of Mr. Chappell as a patent attorney. Is it conceivable that Mr. Chappell, before preparing Mr. Dunkley's pre-

liminary statement under Rule 110, did not question Mr. Dunkley regarding the history of his invention and learn everything that Mr. Dunkley did in respect thereto? Is it conceivable that Mr. Chappell, before preparing said statement, did not discuss with Dunkley just what device was involved in the interference counts, pointing out to him that only the "*skin-removing means*," without any lye-tank, was covered thereby? Is it conceivable that Mr. Chappell, before taking the testimony of the Dunkleys and of any other witnesses called to corroborate them, did *not* learn from the Dunkleys, or either of them, or from any of said witnesses, that in 1902, the model "Exhibit No. 10," exclusive of any tank therefor, was built, *if in fact it was so built, in 1902?* If Mr. Chappell did learn of any such alleged fact, is it conceivable he would *not* elicit from the Dunkleys, when they were on the stand, said fact, the most vital and controlling fact in Dunkley's whole case? Having learned of said alleged fact, is it conceivable Mr. Chappell would have ignored it, and yet ask the Dunkleys about mere drawings, which had been lost? In every interference proceeding, the inventor makes an effort to establish the earliest possible date in respect to every fact pertaining to the history of his invention. The decision in an interference proceeding depends upon the respective dates established by the parties thereto.

In the Beekhuis-Dunkley interference proceeding, the only thing involved, so far as Dunkley was con-



cerned, was his brush-spray-pipe mechanism. The making thereof and the use thereof, exclusive of any lye-tank, was the material thing to be proved. If the use thereof, in July, 1903, with a lye-tank, was a reduction to practice of the invention involved in the interference, then the use thereof at any previous time, *without a lye-tank*, was *equally* a reduction to practice of said invention, *because the only invention involved in said interference did not include, as a part thereof, any lye-tank or other means for disintegrating the skin*, which, so far as said invention was concerned, could be disintegrated by placing the peaches in a pan of caustic soda solution heated over a coal oil stove located thirty-five feet or any other distance from said brush-spray-pipe mechanism and then carried thereto by hand. The foregoing being true, is it conceivable that, *if the model Exhibit 10, exclusive of any lye-tank*, was made and so used in 1902, Mr. Chappell would not have brought out such fact in said interference and relied on same as *a reduction to practice?*

In view of the foregoing situation, it is apparent that one, in order to believe the present testimony of the Dunkleys to the effect that the model Exhibit No. 10 was built in 1902, must also believe the following:

1st. That S. J. Dunkley is not to be believed when he says that no lye-tank was ever built for the model "Exhibit 10."

2nd. That Mr. Chappell, prior to preparing

Dunkley's preliminary statement, did not learn from him that model "Exhibit No. 10" was built in 1902, and

3rd. That Mr. Chappell, in preparing to take the interference testimony, did not learn from the Dunkleys that model "Exhibit 10" was built in 1902, or

4th. That having learned said fact, Mr. Chappell did not know that said model, *exclusive of any lye-tank*, embodied all the elements of every count in the interference, or

5th. That Mr. Chappell, having learned of said fact and knowing said model did include all the elements of every count, was not sufficiently versed in the patent law to know that the making and use of said model in 1902, *without a lye-tank*, was a reduction to practice if the use thereof, in July, 1903, with a lye-tank, could be considered a reduction to practice, and therefore, did not take the trouble to bring out the fact of such making and use in 1902, or

6th. That Mr. Chappell, having learned of the building of the model "Exhibit 10" in 1902, did not believe said fact to be of sufficient importance to bring out in the interference, although he did believe it to be of sufficient importance to bring out the alleged fact that, in 1902, Dunkley made some sketches of the machine, but which sketches were lost! and,

7th. That it was possible for all the witnesses in the interference to give their testimony without *voluntarily* suggesting or intimating that said model was made in 1902, if in fact it was so made, and

8th. That Bruncker, who admittedly *never was at the South Haven cannery until after June 12, 1903*, committed deliberate perjury when he testified herein on defendant's behalf, that the ex-

perimental model *one-line* machine was made by Campbell while Brunker was at said cannery. *There is no possible chance of Brunker being mistaken as to dates, and, therefore, his testimony on this point, must be either true or deliberate perjury.*

In view of the foregoing, we respectfully submit that plaintiff's contention, that said model machine, Exhibit No. 10, was made in 1902, is an affront to one's intelligence.

Plaintiff's entire proofs, in reference to the history of the Dunkley invention, comprise the testimony of Samuel J. Dunkley, the alleged inventor, his son, Melville Dunkley, and H. C. Schau; the model Exhibit No. 10; Brunker's letter of June 12, 1903, to the Dunkley Co. (R. 612), which serves only to absolutely fix the period of his employment at South Haven as commencing subsequent to such date; and Exhibit No. 8, a letter to the Dunkley Co. from the Clark Engine & Boiler Co. (R. 741).

It is *most significant* that the *only documentary evidence* offered to corroborate the Dunkley testimony is said Clark Engine Co.'s letter and that was offered solely for the purpose of attempting to bolster up the preposterous excuse given by the Dunkleys for changing their testimony in reference to the year in which the model machine, Exhibit No. 10, was built. However, said letter signally fails to accomplish the

purpose for which it was offered. Said letter reads as follows:

(Letter head of Clark Engine & Boiler Company.)

"April 21, 1903.

"Dunkley Co.,  
City.

"Gentlemen:

"In reply to your favor of the 21st, we regret that there should be any disappointment in the cost of *the tank*, but we find there is no mistake; you can weigh the tank, and you will find that it would be impossible to furnish it for \$25.00. We just charged up the actual time as reported by the foreman of our boiler shop. It would have pleased us, if it had cost even less than \$10.00; but we could not furnish it at a closer figure than the invoice calls for.

"Very truly yours,

"CLARK ENGINE & BOILER CO.,

"By G. C." (R. 741).

The use of said letter as a means of enabling him to change his testimony, regarding the date of building the model machine, is thus explained by Melville Dunkley:

"A. The machine was not completed until the season of 1903, and until my memory was refreshed with the letter from the Clark Engine & Boiler Company, I was not sure in my mind whether the machine was finished in 1902 or 1903. However, after reading the letter, I remembered the incident, and knew the machine was finished, the machine of which that is the frame was finished before the tank, the scalding tank, was made" (R. 465).

It will be noted that said letter refers to no particular kind of tank and tanks of all kinds are the most common things in use about a cannery. Melville Dunkley admits that tanks, other than any tank used with a peach peeler, were used in the Dunkley Company's business (R. 467). Therefore, the reference, in said letter to "*a tank*," proves nothing and said letter, on its face, does not corroborate the Dunkley testimony. Undoubtedly, plaintiff could have produced numerous bills for tanks bought at different times. The selection of any particular bill for "*a tank*" or of any particular letter, referring to "*a tank*" in order to meet the exigencies of plaintiff's case is of no corroborative significance.

However, why should such a letter remind Melville Dunkley that the model Exhibit No. 10 was made in 1902? If he knew the "alleged tank" was made after the brush-spray-device, why, in the interference proceeding, did he say the *whole* model machine was made in July, 1903? If, when testifying in 1910, he thought the alleged tank was not made until July, 1903, why did he not mention the fact that the brush-spray-device was made before? In other words, the most he could claim for said letter would be that it reminded him that the lye-tank was made before July, 1903; but that has nothing to do with the *relative* date of the building of the *brush-spray device*. If that was built *before* the alleged "*tank*," and Dunkley mistakenly thought the tank was not built until July,

1903, why did he not say the *brush-spray device*, the *only device* involved in the interference, was made before July, 1903?

Furthermore, how strange it is that all the witnesses in the interference proceeding should make the same mistake and say the model machine was made in July, 1903. Did they all take Melville Dunkley's word for it, when they so testified? Of course, the fact is that no lye-tank was ever bought or made for or used with such model machine. *Furthermore, how strange it is that the only documentary evidence produced by plaintiff is such a letter offered solely to bolster up the excuse for a change in testimony.*

As said letter, on its face proves nothing, it is apparent that plaintiff's whole rebuttal case, as to Dunkley's date of invention, rests solely and alone on the oral testimony of three witnesses, uncorroborated by any documentary evidence. Said testimony relates to events occurring over thirteen years ago. At that time, to wit, in 1902, Melville Dunkley was only twenty-one years old and Harry Schau only nineteen years old. Both of the Dunkleys are highly interested witnesses. *We feel quite safe in saying that no prior use defense was ever sustained by any court on any such showing as that made by the plaintiff herein, yet the burden on plaintiff, in proving its said rebuttal case, is precisely that on any defendant in attempting to prove a prior use defense.* As said in *Eck v. Kutz*, 132 Fed., 763:



"But the complainant is a highly interested witness, and his son is not much better; nor does the cam cylinder prove anything by itself, however primitive, being adaptable to whatever date may be assigned to it. The earlier date contended for rests, therefore, upon the mere say so of the father and son, without any corroboration or convincing circumstance, which hardly fulfills the high degree of proof required when the date of an invention is material in order to escape anticipation. *Clark Thread Co. v. Williamantic Linen Co.*, 140 U. S., 481; *Westinghouse Electric & Mfg. Co. v. Saranac Lake Erie Light Co.*, 108 Fed. 231."

Of course, the opposing parties appreciated the value and necessity of offering documentary evidence to corroborate the oral testimony of plaintiff's three witnesses, but no such evidence is or ever was in existence. The testimony of plaintiff's witnesses is not true and said fact not only explains the absence of documentary evidence, but it also explains the admitted failure to seriously attempt to obtain such evidence. On this point, the patentee Dunkley said:

"MR. WHITE—Q. Have you made any effort to secure any records proving any of the dates regarding the making or using of any of these peach-peeling machines, and if so, what efforts have you made? A. *I do not remember making any particular inquiries. I think my son did*" (R. 503-505).

The Court must appreciate the immense amount at stake in this and contemplated litigation. Hundreds of thousands of dollars, according to plaintiff's con-

tentions, are certainly involved. Plaintiff's officers obviously knew that the burden of proof would be shifted to plaintiff and for that very reason had Schau out here to testify in rebuttal. A mere tyro in the patent law fully appreciates the heavy burden of proof on a plaintiff in attempting to carry the date of the patentee's invention back of an anticipation. A mere tyro in the patent law fully appreciates the almost absolute necessity of corroborating oral testimony with documentary evidence when such an issue is to be proved. However, the Dunkleys knew there was no use to attempt to secure genuine documentary evidence to corroborate false testimony. Such testimony can be corroborated only by manufactured evidence. We shall later show that there is, in existence, plenty of documentary evidence which will corroborate the testimony of any witness telling the truth regarding the making of model "Exhibit No. 10" and Dunkley's first commercial machine.

*"As counsel says, there are occasions in the world when the paucity of proof in the affirmative is positive proof in the negative."*

*American Bell Tel. Co. v. National Tel. Mfg. Co., 109 Fed., 1018.*

In view of the total lack of any documentary evidence corroborating the oral testimony of the Dunkleys, we shall now consider the extent to which, in our opinion, the Court should or can rely on the

memory of said witnesses. Certainly one must admit that, when property rights of a value of hundreds of thousands of dollars are at stake *and dependent upon the mere memories of three witnesses as to events occurring thirteen and more years ago*, said memories should be able to survive a real acid test. Furthermore, no reliance can be placed on the memory of a witness who remembers nothing but the few facts essential to the establishment of the case of the party calling him. *Likewise, no reliance can be placed on the memory of a witness who declines to remember any fact that possibly can be disproved by documentary evidence.* Some witnesses are willing to remember anything, if they only feel quite sure that what they remember cannot be disproved by documentary evidence.

We shall quote the patentee Dunkley's answers to numerous questions regarding important facts to show the unreliability of his memory. The quoted questions do not, in the record, follow each other, in most instances.

"Q. Where did you buy the caustic soda in the year 1903?

"A. *I really cannot tell you.*

"Q. Do you know what amount of it you bought in 1903?

"A. *No*" (R. 490).

\* \* \*

"Q. In 1902, did you have peach pitting machines operating in that cannery or were the peaches pitted by hand?

"A. *I am not exactly clear on that; we pitted lots of them by hand*" (R. 491).

\* \* \*

"Q. Where was the model constructed, in that cannery?

"A. I could not say; *it might have been constructed in Kalamazoo.*

"Q. *What kind of gears were used in that model?*

"A. *I could not say that.*

"Q. Where were these gears procured?

"A. *I could not say that.*

"Q. Where were the brushes, which were used in the model procured?

"A. *I could not say that; I think they made them in Kalamazoo*" (R. 493).

\* \* \*

"Q. Did Stewart Campbell build the model machine, 'Plaintiff's Exhibit 10'?

"A. *Not that I know of*" (R. 493).

\* \* \*

"MR. WHITE—I direct your attention to this 'Plaintiff's Exhibit No. 10' and ask you what function, in the operation of the machine, did these gears perform which are on the shaft on which the pulley, at the other end of the machine, is mounted?

"A. I presume, *if there is gears there*, to help turn the brushes.

"Q. Do you know?

"A. *No, I do not know.* It is simple enough machine; anybody could judge by looking at it" (R. 496).

\* \* \*

"Q. Who made the drawing for the commercial machine?

"A. *I could not say about that*" (R. 497).

\* \* \*

"Q. Now, who made the drawing for that lye-tank which was used in that commercial machine?

"A. *I could not say to that.*

"Q. Where was that lye-tank procured which was used in that commercial machine?

"A. *I could not say to that; we had a great many places to procure tanks from*" (R. 498).

\* \* \*

"Q. Where did you get the brushes for that first commercial machine?

"A. *I could not say as to that.*

"Q. Where did you get the chains which were used in the lye tank for that commercial machine?

"A. *I could not say as to that*" (R. 499).

\* \* \*

"Q. Who operated the first commercial machine during the first year it was operated?

"A. *I don't know that*" (R. 500).

\* \* \*

"Q. When was the third peach peeling machine made by the Dunkley Company?

"A. The third?

"Q. Yes, counting the experimental model machine as the first?

"A. *I could not say as to that*" (R. 500).

\* \* \*

"Q. Was there one of these machines (cast-iron frame machines) built prior to November 1, 1904?

"A. *I could not say as to that*" (R. 501).

\* \* \*

"Q. Where did you get the castings for those cast-iron frame machines?

"A. *I could not say about that*" (R. 501).

\* \* \*

"Q. How many peach peeling machines of this type has the Dunkley Company built?

"A. Which type, the iron?

"THE COURT—No, the type of the patent, commencing with the experimental model machine.

"A. *I could not tell you without looking over our books*" (R. 501).

\* \* \*

"Q. Has the Dunkley Company at any time up to the present time made more than ten peach-peeling machines of the type disclosed in the patent?

"A. *I could not say*" (R. 502).

\* \* \*

"Q. You mean that you think you started using these seamers, shown in the photograph, in 1902?

"A. I think we did, *but I am not clear; it was along about that time; we made so many changes and put on so many things, it is hard to say*" (R. 508).

The memory of the patentee's son is no better than that of his father. We now quote a number of the son's answers to various questions:

"MR. WHITE—Q. Now, in what part of the cannery was this first machine for peeling peaches constructed, and by whom?

"A. This first machine, *I do not know just where it was constructed nor by whom it was constructed*; it was constructed under the orders of myself and my father, and I saw it at different



places in the factory during the process of construction, which took some time" (R. 434).

\* \* \*

"Q. You don't know to whom you gave instructions to make that first machine?

"A. *No*; there were so many of the boys around there that were capable of putting that together, I could not say who I gave the instructions to; any one of these I have named was capable of building it.

"Q. You don't know who built that first machine?

"A. *No*" (R. 435).

\* \* \*

"Q. Where did you get the brushes which were used on this first machine?

"A. I think they came from the Indianapolis Brush & Broom Factory; however, *I am not sure*.

"Q. Will you state positively that they did not come from Riddeford & Company, Chicago?

"A. *They may have*; we have bought brushes from them" (R. 436).

\* \* \*

"Q. *Are you willing to state that that first machine was not driven by use of friction gears?*

"A. *No, I would not say*.

"Q. As a matter of fact, it was driven by a friction gear, isn't that correct?

"A. *I don't know; I could not say; I have an idea it was driven by gears, but as to the manufacture, I could not remember*" (R. 436).

\* \* \*

"Q. Who made the drawing for this second machine?

"A. *That I am unable to say*.

"Q. Who worked on the second machine?

"A. *That I would be unable to say*.

"Q. Who operated that second machine during the peach season of 1903?

"A. *That I could not say.*

"Q. Where did the gears come from which were used on the second commercial machine?

"A. *I am unable to state*" (R. 446).

\* \* \*

"Q. Where was the tank purchased for this second commercial machine?

"A. *I am unable to state.*

"Q. Where were the chains bought for this second commercial machine which were used in the tank?

"A. *I am unable to state*" (R. 447).

\* \* \*

"Q. Where were the brushes bought for that second commercial machine?

"A. *I am unable to state*" (R. 448).

\* \* \*

"Q. Where was the caustic soda bought which was used in the year 1903, in connection with the peeling of peaches that year?

"A. *I am unable to state*" (R. 448).

\* \* \*

"Q. On or about November 1, 1904, had you yet, at that time, built a cast-iron frame machine, an improvement on the first commercial machine?

"A. *I could not tell you just when those were built*" (R. 449).

\* \* \*

"Q. When this experimental model machine was first tested was it connected up with that shaft in that room?

"A. *That I could not tell*" (R. 451).

\* \* \*

"Q. Where were the castings made for the first iron frame for the peach peeling machine?

"A. *I do not remember*" (R. 460).

\* \* \*

"Q. Did the Clark Engine & Boiler Company deliver to your factory in Kalamazoo about January 30, 1904, a tank, a lye-tank?

"A. *That I could not remember*" (R. 461).

The following answers of this witness, regarding an occurrence as late as February, 1916, indicates about what weight can be accorded to his testimony:

"Q. Did you or did you not buy any other tanks?

"A. In 1904 we bought other tanks; I could not say from whom; then we bought a number of them later. The letter which I found regarding the Clark first tank was the only record that I was able to find which refreshed my memory at all on that matter, *and we afterwards went and looked at the invoice and at the same time found that you had been inquiring at the same place.*

"Q. *Did you go to the Clark Engine & Boiler Company and look at their records?*

"A. *Yes.*

"Q. Did you find there that the order number for that tank was 9463?

"A. I could not say as to the order number.

"Q. What man of the Clark Engine & Boiler Company did you see in regard to that order for that tank?

"A. *I did not see anyone; I sent someone.*

"Q. Who did you send?

"A. From my office.

"Q. *Who did you send from your office?*

"A. *I don't know just who I sent, Mr. White*" (R. 440).

It will be noted the witness first said *he went to the Clark Company's office*. When he perceived the possibility of being checked up on said statement, he immediately changed his testimony and said *he sent someone*. He finally appreciated the dilemma he was in, so sought the usual refuge of lapse of memory regarding an incident that occurred only a month before. The reason for this witness pretending to have made said investigation at the time mentioned, was undoubtedly to enable him to pretend that, before the trial of these cases began, he knew of the investigations made by White, one of the defendant's attorneys, whereas, in fact, he was taken by surprise at the knowledge of defendant's attorneys.

Certainly, if a witness cannot remember the details of such an occurrence in February, 1916, his memory is not to be relied on to prove, *beyond a reasonable doubt*, what occurred fourteen years ago.

Harry Schau was the only witness called to corroborate the Dunkleys' testimony. He was only nineteen years old in 1902. He states that, in November, 1902, he saw the model machine "Exhibit No. 10" in the basement of the north wing of the cannery at South Haven. Said model was made in said basement room in September and October, 1903, and was tested there, for the first time, in October, 1903. No doubt it was still in said basement room in November, 1903. Being one year out in regards to the time when he first saw the model machine, throws all of his tes-

timony one year out. In other words, he fixes his dates one year too early, and, therefore, there is no occasion for analyzing his testimony in detail.

*Plaintiff's whole rebuttal case necessarily depends on establishing the building of such model "Exhibit 10" in 1902, as the building of same starts the history of Dunkley's alleged invention according to his own testimony to the effect that he conceived the invention in August, 1902, and built and completed said model "Exhibit 10" in that same month. Regarding said "Exhibit 10," he said: "That machine was completed sometime in August, 1902" (R. 510). We wish to particularly emphasize the foregoing fact that the inventor, Samuel J. Dunkley, testifies herein that he both conceived the invention in August, 1902, and, in that same month, completed the model machine, "Exhibit No. 10." Therefore, the building of such Exhibit No. 10 and the date of conception of the invention by him, are represented by Dunkley to have been practically contemporaneous. Therefore, the date of the building of the model, for all practical purposes, fixes the date of the conception. Defendant's proofs, conclusively showing said model was built after Bruncker's arrival at the South Haven cannery in 1903, destroy the whole Dunkley story. Of course, said proofs are consistent with and corroborated by the Dunkley testimony, in the interference proceeding, to the effect that said model was,*

*in fact, built in 1903, at a time when Brunker was at South Haven.*

The exigencies of the interference proceeding did not prompt the Dunkleys to carry the date of completion of said model back more than three months prior to the actual date of completion. In said proceeding, they stated it was built and completed in July, 1903. Defendant's proofs, herein, show it was built during September and October, 1903, and completed and tested in the latter month. The account book of defendant's witness, E. B. Mapes, conclusively shows it was not completed until after October 6, 1903, because, on that day, he completed the *friction gears* which were used in the model to drive the rotary brushes therein (R. 638).

Defendant's witness, William Brunker, at present the proprietor of a restaurant in Sacramento, was employed by the Dunkley Company in 1903 at its South Haven cannery. His employment commenced the latter part of June and ended the latter part of October, 1903. Regarding Brunker, S. J. Dunkley says:

"Q. When did William Brunker enter the employ of the Dunkley Company and when did he leave it?

"A. I don't think he stayed over three or four months; he entered the employ *some time in June, 1903*; that is my recollection" (R. 506).

In connection with Brunker's cross-examination,



plaintiff's counsel read into the record Brunker's letter of June 12, 1903, written by him in New York, to the Dunkley Company concerning his proposed employment by that company (R. 610). This fixes absolutely the fact that Brunker did not enter that company's employ until after the middle of June, 1903. He remained in its employ a little over four months and left on the last boat to Chicago (R. 603). He was never in South Haven or in Kalamazoo at any other time (R. 603). *Said period of four months in 1903 covers Brunker's whole connection with the Dunkley Company and, therefore, there is no possible chance of Brunker being confused as to the year or period in which anything occurred at South Haven and concerning which he has testified.*

Brunker's letter shows he was employed to make fruit jams but it was soon found out that said product would not pay. On cross-examination he said:

"XQ. Then what did you do?

"A. Then Campbell came along after that, I could not say just how long after I went to South Haven, but probably a few days, and he said: 'I came down to put the factory in shape for the packing season and install some machinery,' and he says: *'I have a big table to make,'* so I helped him with his work, regular laboring work.

"XQ. What was the machinery that you installed?

"A. Well, it was—the seamer is one of them for seaming the covers on the cans and there was some vacuum machine there; there were some four or five of them altogether.





"XQ. Where did these machines come from?

"A. I don't know where they came from but they came from one or two cars, I don't know which, and they were there; I could not say just whether they came before I went there or after, but they came on the railroad" (R. 609).

Regarding the "*big table*" built by Campbell, with some slight assistance from Brunker, the latter says:

"Q. What kind of a table was that that you refer to?

"A. It was a table nearly the length of the room with a carrying belt down the center; the idea of it was to put their peeled goods on the belt, and it was carried along to where they were washed and packed" (R. 599).

On the opposite page appears a cut of the peach peeling table referred to by the witness. Said cut is reproduction of "Defendant's Exhibit V, photo of Dunkley Peeling-table" (R. 527). "Defendant's Exhibit X, photo of Dunkley, filling table," shows an extension of the peeling table, said extension being used as a packing or filling table (R. 527). A large number of women are clearly shown, in said photograph, peeling peaches *by hand* and by the use of the St. Clair-Scott machines. The appearance of the fruit being handled and the use of said machines conclusively prove said fruit to be peaches. *Said machines were only used to peel peaches.* The pears were always peeled by hand and "there never was much:

Michigan has never been much of a pear State" (Melville Dunkley, R. 421).

The building of said peach peeling table in July and August, 1903, is absolutely and totally inconsistent with the Dunkley testimony that, at that very time, they had a lye-peeling machine which necessarily would do away with the peeling of peaches by hand, either with the use of hand knives or the St. Clair-Scott machines. Both the Dunkleys and opposing counsel fully appreciated the significance of the proof that, in July and August, 1903, the Dunkley Company went to the large expense of changing the 1902 method of handling peeling peaches about a *number of small tables* and substituted therefor *one long table* at which the women could sit while peeling peaches *by hand* and with the St. Clair-Scott machines. Both Melville Dunkley and opposing counsel (R. 492) became very much agitated over the very idea of merely calling such table a "*peach peeling table.*" Naturally. The building of said peach-peeling table in July and August, 1903, utterly destroys the last remnant of even the remotest probability of there being any truth in the Dunkley story that, *at that very time*, they had a lye peach peeling machine *which would do away with any necessity for such a peeling table.* Furthermore, we shall hereafter show, by Campbell's testimony, that, when the Dunkleys did have such peach peeling machine in 1904, all but about twenty or twenty-five feet of said peach

peeling table was removed and what was left was used for inspecting and sorting the peaches after they came from the pitting machines, which followed the said peach peeling machine (R. 541). *Said change*, in 1904, conclusively demonstrates that said table would not have been built in 1903 prior to the 1903 peach season if, at that very time, the Dunkleys had a lye peach peeler. That such change in the table may have been made, as testified to by Campbell, is admitted by Melville Dunkley, who says:

"A. *The table might have been changed. I don't remember of any time that it was moved to make way for a peeling machine; the proportion of the drawing here is not wide however; it has been grouped together to a considerable extent*" (R. 453).

Brunker's testimony conclusively fixes the date when said table was built. Regarding said table, the patentee, Samuel J. Dunkley, said:

"Q. In 1903, during the months of July and August, was there constructed in your cannery at South Haven a peach peeling table about 90 feet in length having a conveyor down the center and platforms upon either side upon which were placed chairs for the women peeling peaches?

"A. I remember such a table that was there, a conveying table, but I do not remember just what time it was built.

"Q. You don't remember what year it was built?

"A. No. *I know it was built after 1902.*



"Q. And that table was built as a peach peeling table?

"A. Not particularly; as a peach pitting and *peeling* table and to inspect the fruit" (R. 491).

Of course, when the peaches were peeled *by hand* at said table, the women, at the same time, halved and pitted them *by hand*. The halving and pitting were merely incidental to and a part of the operation of peeling *by hand*. The women also naturally inspected the fruit when they peeled it; no second inspection could or would be necessary. Hence, Mr. Dunkley's more elaborate description of said table is consistent with the fact that it was, in fact, *a peach-peeling table, which was built after 1902*.

Regarding one of the row of small peach-peeling machines, located at the right edge of the peach-peeling table shown in said photograph thereof, S. J. Dunkley said:

"Q. I draw your attention to the small machine on this table in front of the operators, and ask you to state if the same is one of these St. Clair-Scott Peach Peeling Machines?

"A. It looks like it; *I might have had them there*" (R. 492).

As indicating how little reliance can be placed in the testimony of Melville Dunkley, we quote as follows from his testimony regarding such peeling table:

"Q. How long was this peeling table?

"A. It was not a peeling table, it was an inspection table.

"THE COURT—*The witness has stated that twice, that it was not a peeling table as you have described it, but it was placed there in 1904 and had an endless conveyor on it and was for inspection purposes. He said no peaches were ever peeled on it.*

"MR. WHITE—Q. Then there was never located on this table the Scott machines for peeling peaches?

"A. *Not to my knowledge.*

"Q. You used that type of machinery in your factory, did you, for peeling peaches?

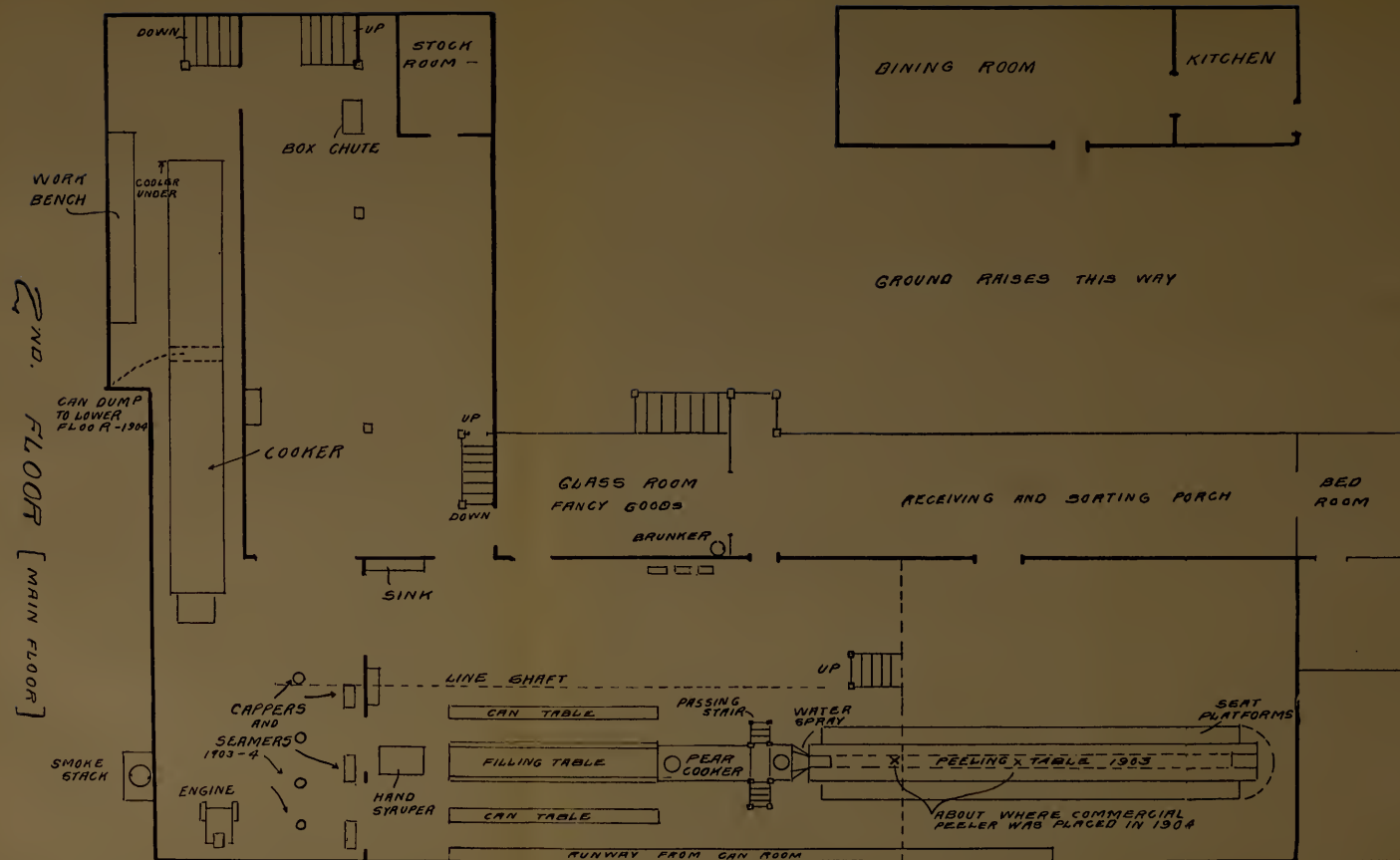
"A. In the early days, yes" (R. 453).

When Melville Dunkley was on the stand, he did not know we had a photograph of such peach-peeling table and of women actually using it as such and peeling peaches thereon, both by the use of knives and the St. Clair-Scott peach peeling machines mounted on the table. Said photograph was not produced until S. J. Dunkley took the stand (R. 492). Therefore, Melville Dunkley felt safe in falsely testifying that the table was *not* a hand-peeling table built in 1903, the significance of which fact both he and plaintiff's counsel fully appreciated.

It will be noted that Melville Dunkley persisted in calling said table an "*inspection table*" and asserted it was built in 1904. Bruncker's testimony shows it was built in 1903, and the photograph and S. J. Dunkley's testimony show it was used as a peeling table. *In 1904, most of this table was removed and the part left was, in fact, actually used as an inspec-*

*tion and sorting table.* In the place of that part of the table removed were located *the first commercial lye peeling machine*, peach pitting machines for halving and pitting the peaches delivered from the peach peeling machine and an elevator for conveying the halved peaches from the pitters to that part of the peeling table that was left. As the peaches, up to this point, had been operated on only by machines, it was, of course, necessary to inspect them and sort out the imperfect fruit. For such inspection work, only a short table was required. *The absurdity of having a table 80 to 90 feet long for mere inspection work is apparent.* The necessary length of such a table is obviously determined by the number of inspectors required to do the work of inspection. Any such table longer than required to accommodate such inspectors, would be useless. Furthermore, there would be no economy in using the lye peach peeling machine if a great number of inspectors were required. On the other hand, the peach peeling table had to be of great length to accommodate the large number required to peel peaches by hand. The large number of women employed by the Dunkley Co. is indicated by S. J. Dunkley's statement ". . . we had built a dormitory that would take care of 150 girls . . ." (R. 479).

On the opposite page appears a reproduction of "Defendant's Exhibit T" showing diagrammatically the 1903 arrangement of the various machines and devices on the main floor of the Dunkley South Haven

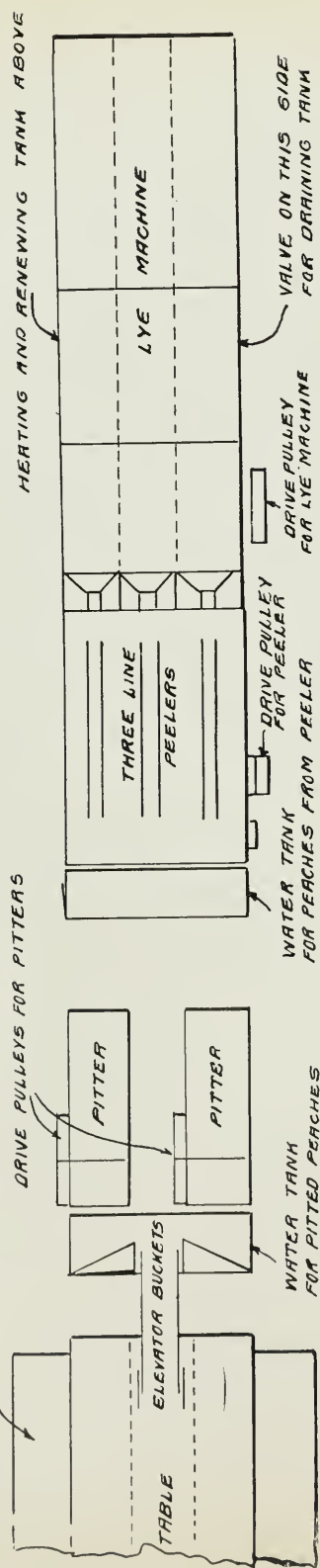








PART OF  
PEELING TABLE - 1903



cannery, with the exception of the "Can Dump to lower floor" which was not put in till 1904, as indicated in the cut. It will be noted that the location of the machines, which *Brunker* assisted Campbell in installing, are shown on the cut as well as the location of the peach peeling table and the extension thereof used as a filling or packing table. In 1904, most of the peach peeling table was removed to make way for the *first* commercial lye peach peeling machine, the peach pitters and the elevator. On "Exhibit T" is indicated about where these devices were located after that part of the table had been removed. On the opposite page appears a reproduction of "Defendant's Exhibit U," showing the 1904 arrangement of the commercial lye peach peeling machine, the pitters, elevator and *the part of the peeling table that was left and used as an inspection table* where the pitted peaches could be inspected and the imperfect fruit sorted out.

Opposite page ~~27~~ appears a reproduction of "Defendant's Exhibit X," a photograph of the extension of the peeling table, used as a filling or packing table. Regarding such table S. J. Dunkley said:

"Q. In the year 1903, was there, as a continuation of that long table, which I have designated a peeling table, a table of this type which was used as a filling table?

"A. *I don't know; there might have been*" (R. 508).

It will be noted that Brunker says the seaming machines arrived on railway cars at the South Haven cannery just before or just after he got there in 1903; he does not know which, but they came on the railroad and he helped Campbell install them. As indicating the unreliability of S. J. Dunkley's memory, we quote as follows from his testimony regarding said seamers:

"Q. I show you another photograph and ask you to state what the same is?

"A. This looks like one of our first open top double seamers; we were about two years ahead of the other canneries in that respect.

"Q. In 1902, you seamed by hand; is that correct?

"A. I think we started on the open top in 1902, as near as I can remember.

"Q. You mean you think you started using these seamers, shown in the photograph, in 1902?

"A. *I think we did, but I am not clear; it was along about that time; we made so many things that it is hard to say*" (R. 508).

On the opposite page is a reproduction of the photograph shown to the witness and disclosing the seamers referred to.

Before referring to the testimony of Stewart Campbell, we desire to quote from the lower Court's opinion regarding the proofs relative to the history of the Dunkley invention:

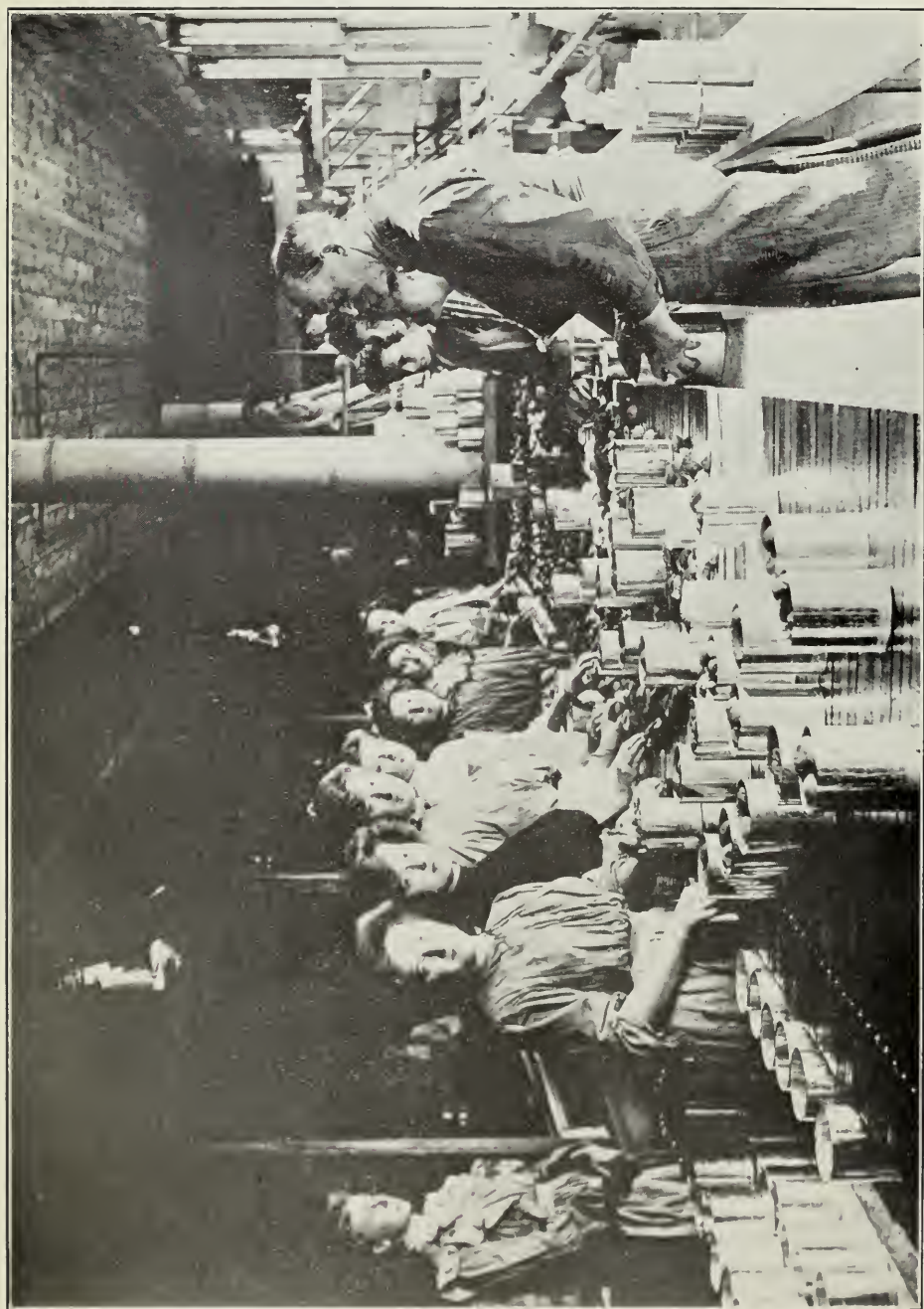
"The main reliance by defendant in the evidence, is upon the testimony of the witness Camp-











bell and that of the witness Brunner. I indicated at the trial, and my mind has only been confirmed in that view by my review of the evidence, that I could not extend the limits of my credulity sufficiently to put credence in the testimony of Campbell. That he worked for the plaintiff at or about the time that he claims, there is no question, but the claim that he puts forth as to what he did in the premises and the time it was done, is entirely beyond my ability to believe. Brunner *tends to corroborate him in certain respects*, but it is not sufficient to change my conclusion on the facts.

"In its essential substance, I regard the evidence on behalf of the plaintiff as making a case *substantially free from doubt*, that the plaintiff's assignor conceived this device and put it into use at a time *at least a year prior to the time claimed by Campbell*, and as this is a question on which the case turns the result is that the decree must go for the plaintiff" (R. 699).

With all due respect to the lower Court, we cannot refrain from saying that, in view of the record herein, the foregoing conclusions are most remarkable and the unexplained process of reasoning, by which the same were arrived at, is entirely incomprehensible to us. In fact, the lower Court's attitude toward defendant's case and defendant's witnesses is incomprehensible to us. *In 1910*, six years prior to the trial of this case, the Dunkleys testified that the model machine was made in 1903, and that Campbell and Brunner may have made it, as they were in the Dunkley Co.'s employ at the time. Campbell and Brunner both take the stand herein and testify that

said former testimony of the Dunkleys is true in respect to the making of said model in the year 1903, and that Campbell made it with some slight assistance from Brunker. The Dunkleys take the stand, change their former story in respect to its most vital feature, and say the model was made in 1902, almost a year before Brunker ever entered the Dunkley Company's employ; and the lower Court, *on such changed testimony*, in effect condemns Campbell and Brunker as perjurers, for so corroborating the 1910 testimony of the Dunkleys! We are absolutely certain that Campbell and Brunker are not the witnesses who committed perjury in this case. We are absolutely certain that the two Dunkleys deliberately committed perjury herein and if this Court can, within the proprieties, recommend that the United States Department of Justice, with all its resources, investigate the facts of this case and bring to justice the guilty parties, we ask that such a recommendation be made. Such a request is made because of the difficulty of getting such Department of the Government to take action in respect to perjury committed in a civil action. In respect to such an investigation, we can safely predict that it will prove most successful, as there are certainly dozens of witnesses, scattered throughout the United States, who have knowledge of the facts and many of whom appear in the photographs included in this brief. We appreciate the foregoing request may be an unusual one, but in this

enlightened age, we can see no impropriety in suggesting, in a Court of Justice, any course which may tend to promote justice.

It will be noted that the lower Court states that "Brunker *tends* to corroborate him (Campbell) in *certain respects* . . ." As a matter of fact, Brunker corroborates Campbell in *all* respects, so far as the vital facts of the case are concerned. Brunker states the model machine was made when he was in South Haven in 1903; that it embraced *no lye-tank*; that it was the *only* brush-spray peach peeling machine there while he was there; and that, during the 1903 peach season, *no* peaches were peeled *commercially* on such machine. His testimony, therefore, fully corroborates Campbell's testimony in respect to all the controlling facts. Furthermore, the testimony of both Campbell and Brunker is corroborated in part by the testimony of Mapes and by Mapes' account book.

In view of the foregoing, we respectfully ask the Court to consider the testimony of the various witnesses, on this phase of the case, from the viewpoint that it is either true or deliberate perjury. It is only by taking such a view of the testimony that one can appreciate the full significance of every answer; of every evasion; of every lapse of memory. We also ask the Court to consider the uncontradicted circumstantial evidence in the case, in respect to the ordinary rules governing human conduct; the possibility of any such testimony, as that given by Campbell

and Brunker, being fabricated and Brunker being coached to give the full history of a device now contended by plaintiff to have been built almost a year before Brunker was ever in South Haven or knew anything about it; the possibility of the innumerable facts of said testimony, if fabricated, being made to dove-tail so nicely with the innumerable facts admitted by the Dunkleys; and finally, the probability of any one, connected with the defendant, daring to persuade Campbell, Brunker and Mapes to commit perjury in respect to facts of which scores of persons, now scattered throughout the country, have knowledge.

The change in the Dunkley story to meet the exigencies of this case, makes the following remarks most pertinent:

“A plaintiff, we think, after having sworn to facts resting in his own observation and knowledge before one jury, should not be permitted to swear to facts directly inconsistent and to obtain from a second jury a verdict in his favor which will involve the conclusion that his testimony at the first trial was knowingly false. A party testifying under oath is more than a mere witness. He is an actor seeking the intervention of the judicial power in his behalf, and thus subject to the rule *‘allegans contraria non est audiendus,’* which, as stated in Brown’s Legal Maxims, p. 130, ‘expresses in technical language the trite saying of Lord Kenyon that a man should not be permitted to “blow hot and cold” with reference to the same transaction, or insist at different times, on the truth of each



of two conflicting allegations according to the promptings of his private interest'."

*Smith v. Boston Elevated Ry. Co.*, 184 Fed., 389.

Stewart Campbell, who has been employed in the Signal Service of the Southern Pacific Company since August, 1905, and now resides in Berkeley, California, entered the employ of the Dunkley Company early in 1902, and left its employ on September 3, 1904. Regarding Campbell and the reason for and the nature of his employment by the Dunkley Company, Melville Dunkley said:

"Q. What were Campbell's duties during the time he was in your company's employ?

"A. *He was employed primarily to develop the syruping machine and the peach pitter*, of which he had given some idea that he could build a machine capable of pitting peaches; *he was known as more or less of a genius* and was a brother of a family friend.

"Q. He was really employed during those years to *originate and invent* new devices of (or) machines in your cannery; is that correct?

"A. Just the special two; he had the idea before he came with us, we understood from him, from others" (R. 456).

It will be noted that even Melville Dunkley did not hesitate to say that *Campbell was known as a genius and was actually employed to invent machines*. Such a statement, coming from him, is certainly most significant, in view of Campbell's testimony.



Regarding the syruper, referred to by Melville Dunkley as Campbell's invention, S. J. Dunkley said:

"Q. In the month of December, 1903, did you buy any gears from the Boston Gear Works at Boston?

"A. I shouldn't wonder but what we did, for we were building *some machines, I think Campbell was at that time, I think he was building a complicated syruper machine*" (R. 500).

It will be noted that, in the opinion of S. J. Dunkley, one of the inventions, *admittedly made by Campbell*, was a "*complicated*" machine. *It will also be noted that it was Campbell who was also building the other machines referred to by Dunkley.* The other invention, admittedly made by Campbell, was the peach pitting machine. On page 583 of the record, there is a description of such pitting machine. It is apparent, from such description thereof, that said machine was the most complicated of any machine that Campbell said he built and *it is admitted he invented the same.* On three other inventions, made by Campbell, plaintiff's attorney herein, Mr. Campbell, as his attorney, secured patents. One of these patents, "Defendant's Exhibit Z" (R. 544), covers what Campbell terms an "orchard pitter" and contains twenty-five claims. The said number of claims indicates the radically novel nature and also the complexity of said invention. On the opposite page is reproduced Fig. 1 of said patent for the purpose of showing the com-

No. 807,416.

PATENTED DEC. 12, 1905.

S. L. CAMPBELL.  
PITTING MACHINE.

APPLICATION FILED DEC. 5, 1904.

3 SHEETS—SHEET 1.

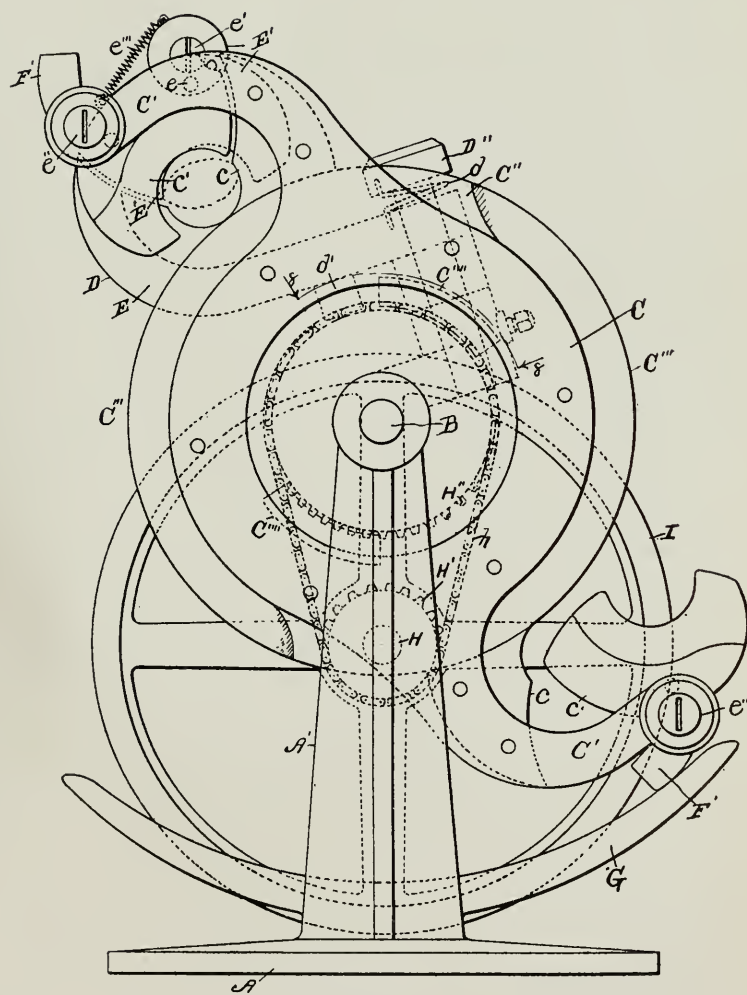


Fig. 1

Witnesses

Bessie K. Ooms  
Ethel. Siller

Inventor,

Stewart L. Campbell

By Chappell & Earl  
Att'y's



plicated mechanical movements embodied in such machine so invented by Campbell. The foregoing shows that the Dunkley Company employed Campbell *as an inventor to invent and develop machines and that his duties embraced the actual designing and building of machines.*

For about the first two months of his employment by the Dunkley Company, Campbell, however, did only odd jobs about the factory in Kalamazoo and received only a salary of \$60.00 per month, it being understood that he was to receive a raise when he began to do regular work at South Haven, to which place he went about April, 1902 (R. 552-556). In 1902, a salary of \$60.00 was equal, in purchasing power, to a salary, at the present time, of nearly one hundred dollars anywhere in the country. Furthermore, in a small place, salaries naturally would not be as high as in large cities and the high salaries paid in California to machinists are no criterion by which to judge the value of a man's services performed fifteen years ago in the East for any particular salary. When Campbell began his regular work, he was raised to about \$75.00 (R. 556). Thereafter, he was raised to \$100.00 per month and expenses, while at South Haven (R. 564). Such a salary, in 1903, would equal in purchasing power anywhere in the country, at the present time, not less than \$175.00 and probably more than \$200.00 in large cities. A salary, having a present-day purchasing value of \$175.00 in

a small place like South Haven, undoubtedly was there considered a large income. It is quite certain that Campbell was the highest salaried man in the Dunkley Company's employ.

After the first month or so of his employment during the early part of 1902, there is no question but that *Campbell was almost continuously engaged in designing, building, remodeling or repairing machines and apparatus* used in and about the Dunkley Company establishments at Kalamazoo and South Haven. There is no suggestion by the Dunkleys that, after said early period of his employment, he did any other kind of work. It will also be noted that, nowhere in their testimony, do the Dunkleys name any other man as one who was regularly engaged in said kind of work for the company, although they were most reluctant to admit that Campbell made the model Exhibit 10 and the first commercial peach peeling machine. *However, they did not dare assert that any other employee did build said machines and name him because they feared we would be able to locate such employee.* It must be apparent to anyone, familiar with the record herein, that Campbell knows more than anyone else about the construction of the various machines made by the Dunkley Company during the years 1902, 1903 and 1904. His testimony, as compared with that of the two Dunkleys, conclusively proves that fact. Furthermore, it is incredible that the Dunkleys should not know that Campbell possessed

such knowledge of what transpired at the Dunkley Company's establishments during those years because they knew he, *the man actually employed to invent, develop, design and build new machines*, above all others, was in a better position to gain such knowledge. Therefore, if the Dunkleys had desired the truth to be brought out in this case, they knew they could get no better witness than Campbell. Did they try to get him as a witness? Did they want him as a witness? No, indeed. In that regard, S. J. Dunkley's testimony, regarding meeting Campbell in February of 1916, in Kalamazoo, is most illuminating:

"Q. When you saw him in Kalamazoo, did you speak to him, ask him where he lived?

"A. I do not remember; *I might have.*

"Q. In that conversation, did he tell you he lived in Berkeley, California?

"A. *He might have.*

"Q. At that time did you speak about this suit and the possibility of getting him as a witness for you?

"A. *No, I never mentioned it; I did not think of it*" (R. 506).

Regarding a similar meeting between Campbell and Melville Dunkley at Kalamazoo, in February, 1916, only a few weeks before the commencement of the trial of this case on March 24, 1916, Melville Dunkley testified:

"Q. Where does Stewart Campbell live?

"A. I saw Stewart Campbell in Kalamazoo a



few days ago or a few weeks ago; otherwise, I have not seen him since he left town suddenly.

"Q. *Did you discuss this case with him?*

"A. In Kalamazoo?

"Q. Yes.

"A. No.

"Q. *Did you mention to him you would like to have him as a witness?*

"A. No" (R. 431).

No, they did not mention the suit to him and, no doubt, were sincerely hopeful that Campbell would never hear of it or the defendant hear of Campbell. No, they did not think of it, because, no doubt, they had already planned to bring out to California, a witness with a more open mind, a witness who was only a nineteen-year-old boy at the time of the transactions regarding which he was to testify; a witness who would remember what he was told to remember. The Dunkleys fully appreciated the advisability of having Harry Schau come all the way out here from Michigan to testify in preference to having Stewart Campbell come over from Berkeley to testify in their company's behalf. They did not want the best witness; one who necessarily knew and remembered the truth and could not be seduced into giving false testimony. If the Dunkleys wanted a truthful witness, necessarily known to them to have knowledge of the facts, how natural it would have been for at least one of them to mention this case to Campbell and suggest his appearance as a witness herein.

We shall hereafter comment on Campbell's testimony in reference to his designing and originating some of the machines built by him. A detailed analysis of said testimony will show that there is absolutely nothing improbable about his contentions in that regard. We shall discuss said testimony, not because it is material to defendant's case whether he did or did not originate said machines, but because we deem it due to Campbell to so discuss the same in view of the criticisms thereof by the lower Court.

Regarding said peach peeling table, Campbell said:

"Q. During the months of July and August, 1903, what were you doing in that company's employ?

"A. In July and August?

"Q. 1903?

"A. I was constructing a peeling table, a peach peeling table and filling table" (R. 524).

"Q. State, if you know, the extent to which that table was used in the peach season of 1903?

"A. Well, it started with pears and it ran through the season of peaches.

"Q. *What methods were used in that cannery of the Dunkley Company at South Haven during the year 1903 for peeling peaches commercially?*

"A. *Hand peeling and peeling with hand machines.*

"Q. *Any other methods used that season?*

"A. *No other method commercially*" (R. 525).

In fixing the exact dates, when the lumber for said table was purchased in July and August, 1903, from the John F. Noud Company, of South Haven, Camp-

bell referred to his diary (R. 399). The table was completed in August, 1903 (R. 526). It will be noted that Campbell does not hesitate to state from what firm the lumber for said table was bought, notwithstanding the books of said firm. the John F. Noud Company, can be used to check up the accuracy of his testimony.

To resume the narrative of events occurring at the South Haven cannery, we quote from the testimony of S. J. Dunkley:

"Q. In 1903 you put up pickled peaches?

"A. In 1903, we started to get ready to put up pickled peaches; as we were using so many more peaches, we did not know what to do with the little fellows.

"Q. Did you do any experimenting with pickled peaches about the month of August, 1903?

"A. I could not say; *it seems to me that is the year we did.*

"Q. Who had charge of that work?

"A. I could not say exactly; we had so many there.

"Q. William Brunker had charge of that work, didn't he?

"A. *He was hired to look after pickled peaches, yes*" (R. 493).

We wish to call the Court's attention to the reluctance with which both the Dunkleys gave any information which would enable one to check up the truth of their story. The foregoing quotation is an example of such reluctance. At this time, we wish to call attention to the fact, that both the Dunkleys

and Schau testified *before* Campbell, Brunker and Mapes took the witness stand and we feel quite certain the opposing parties did not know beforehand that said witnesses would be called by defendant or were even known to defendant. Neither of the Dunkleys nor Schau nor any other witness were called to rebut the testimony of Campbell, Brunker or Mapes.

Regarding the work done by him after helping Campbell install the seamers and vacuum machines and build the peeling table, Brunker said:

"Q. What was the next work that you did after helping him on that table?

"A. Well, there was some pickled peaches that we tried out; Mr. Dunkley had been working on them and he asked me to take hold of them, and they were to be packed with skins on; they were not to be peeled.

"THE COURT—Q. What is that?

"A. They were unpeeled peaches; and I worked in there a little while and then when he expressed himself satisfied, he said he would like some of it glassed with skins off, and *he had heard of some packer who had tried the peeling of peaches with lye and it did all right*; and I suggested that we might try that, and he said, all right, to go ahead and get some lye and try it, and in a day or two after that I asked him to show him what the results of my experiments were, and I just took some of these and put them in a solution and put them undr water and rubbed the skin off with the hand; he said, '*it is going to work all right, we will have to get a machine for that, for what you are doing with your hand.*' I said I could not build a machine and he said, 'that is

all right, we will get Stewart to build that'; that was Campbell; he was superintendent; and he says, 'you and Campbell get together and you show him what you want done and he will make a machine to do it.' So the next day Campbell came in to me and told me that Mr. Dunkley had said that he was to build a machine. 'Now,' he said, 'I want to see what that machine has to do,' and I prepared some peaches as I had done before, and took a brush and brushed the skin off instead of rubbing it off with my hands, and he says, 'I can make a machine to do that all right.'

"THE COURT—Q. Mr. Campbell said that?

"A. Yes.

"MR. WHITE—Q. What kind of a brush did you use?

"A. I bought it in a paint store, some little brush that painters use; I don't know exactly what kind of a brush it was; I didn't know what nature of brush I would need; I just wanted it.

"Q. Go on with your story as regards what followed?

"A. Then Mr. Campbell and I were rooming together at the factory and that night after that he told me 'I have thought of half a dozen ways of peeling peaches, but,' he says, 'there is one way I intend to do it,' and he went on to describe the machine and the description he gave me exactly tallied with the machine he afterwards built.

"Q. What kind of a machine did he afterwards build?

"A. He built a machine, like that, with a carrying belt to carry the peaches along and the brushes alongside were 3 feet long; they revolved and peeled the peaches that were carried through on that belt" (R. 599-601).

On cross-examination, Brunker said:

"MR. CHAPPELL—XQ. Do you remember what time in the month of August you made the first test of the lye?

"A. No; I don't remember the date at all; I could not give you the dates at this time.

"XQ. You had been working at peaches some little time before that matter came up, had you?

"A. Yes, we had worked I think about a couple of weeks.

"Q. And then after you had been working at peaches a couple of weeks Mr. Dunkley discussed this matter with you?

"A. Yes, he discussed the matter with me.

"XQ. And then after that Mr. Campbell came to see you?

"A. Yes" (R. 623).

\* \* \*

"XQ. Did Campbell seem to have any ideas about a machine when he first saw you?

"A. Not when he saw me first; in the first place when he came to me he said that Mr. Dunkley had sent him to me to see what was needed with such a machine; so when I showed him he said 'I can make a machine that will do that.'

"THE COURT—Q. Immediately?

"A. Immediately.

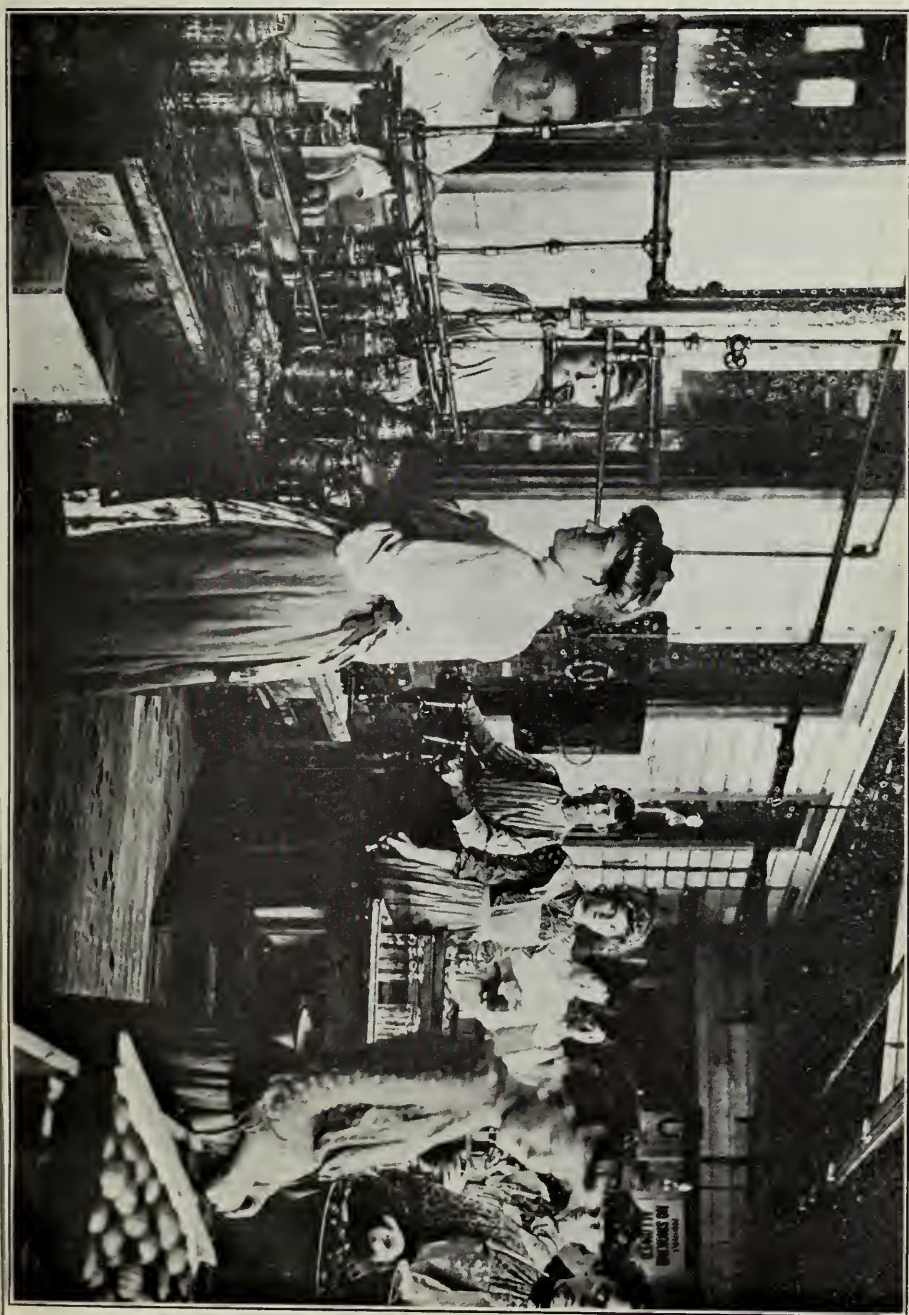
"MR. CHAPPELL—XQ. What did you show him—what had you been doing in the meantime?

"A. I was working on some other work at the time and I stopped that and made some of the solution and put a dozen peaches into it and then took them to the sink and took the brush I had and turned the faucet and brushed them off and he said 'that is what your machine has got to do'; he says, 'I can make a machine that will do that'" (R. 609).



On the opposite page is a cut of the photograph of the preserving room, where Bruner did some of his work.

The lower Court's question as to whether Campbell "immediately" said he could make a machine to do the work indicates its doubt as to the probability of Campbell making such a statement. It will be noted that Campbell, at this time, did not say *how* he could make such a machine; he merely expressed the opinion that he *could* make a machine to do the work Bruner was doing by hand, to wit: *turning the peach over under a jet of water and, at the same time, brushing it.* We respectfully submit that no mechanic, of the most ordinary ability and having had any experience in a cannery, where cans and fruit were being automatically handled and conveyed from place to place, would have expressed any doubt as to his ability to make such a machine. At the very moment when said conversation took place, Campbell's peach peeling table was being used and said table embodied a conveying belt for carrying the peeled peaches along under sprays of water to wash them, as indicated on "Defendant's Exhibit T." There was, therefore, no reason why he should, at the time of said conversation, express anything but confidence in his ability to make a device to perform the exceedingly simple operation being performed by Bruner, as such a device would involve merely the addition of rotating brushes to the said peeling table comprising a con-





veying belt and perforated pipes. He did not pretend, at that time, to have any definite ideas as to the exact means he intended to use to accomplish his purpose, but it was undoubtedly evident to him that the problem presented was not a complicated one, hence his confidence in his ability to solve it. Any one, having any experience with mechanics, knows the facility with which a mechanic off-hand suggests various mechanical ways of performing any specific function. A mechanic deals in mechanical elements and mechanical movements just as a writer deals in words. Ask a writer to express, in words, any particular idea, and he will invariably display a confidence in his ability to do so, even though, on the spur of the moment, he does not suggest any particular combination of words expressing such idea. The same is true of a mechanic, when asked to express, in mechanical elements and movements, any particular idea of means. Of course, it is undoubtedly true that many ideas of means are most difficult to practically express in mechanical elements and movements and, in order to so practically express them, a mechanic must work months and sometimes years. On the other hand, there are many ideas of means capable of being expressed by the use of the most simple mechanical movements. The said peach peeler is one of these. It embodies mechanical movements of the most simple character and in very general use. For years, there have been in use, fruit

graders embodying traveling belts flanked by rotating rollers; fruit and vegetable washers, embodying traveling belts flanked by rotating brushes; paper making machines, embodying traveling belts for carrying the pulp in combination with rollers for operating thereon; bottle washers, embodying traveling belts flanked by rotating brushes, etc., etc. The large number of similar operating devices are referred to in the Dunkley file wrapper. In view of the foregoing, it is apparent that said simple mechanical elements and movements are embraced in the "vocabulary" of the ordinary mechanic just as the simple words of any language are embraced in the vocabulary of one familiar with said language; and, in each instance, the same are available for use in expressing any idea.

Regarding the peach peeling machine made by Campbell after such conversation, Brunner said:

"XQ. Where did you see the machine made by Mr. Campbell for the first time?

"A. I seen it from its beginning; I saw him make or get the brushes that were to be fastened on the belt, that is, to make them carry; that was the first thing; then he riveted them on to the belt and then he made the stand for it, and he called me one day to show me how it was going to work.

"THE COURT—Q. Did he make the rotary brushes also?

"A. No, he bought them in Chicago; he showed me a drawing of them before he sent them.

"XQ. He did make a drawing of them, did he?



"A. Just a little sketch on his letter which he was sending.

"Q. He didn't go to Chicago to get the brushes?

"A. I understand he did afterwards; but he wrote a letter first.

"MR. CHAPPELL—Q. How did you happen to know of his going afterwards for brushes to Chicago?

"A. Because when he came back he told me; he said 'I had to go there myself, I could not get them any other way' " (R. 617).

\* \* \*

"XQ. What do you know about the water there?

"A. We knew that there was a whole lot of water to be used in the peeling of peaches.

"XQ. Can you describe how that was to be used?

"A. Yes, there was to be one pipe between the two revolving brushes and one under them, and they were all to play on the peaches as they went through on the carrying belt.

"XQ. Did he describe that all to you before he made the machine, how he was going to do it?

"A. *Yes, except it was an afterthought, the water on the top was an afterthought; all he intended using in the first place was two, and then when he had the machine made he said, 'I guess we had better put another pipe on top to play down on the peaches.'*

"XQ. When did he put the pipe on top, do you remember?

"A. When he finished the machine, as far as it was finished; when I saw the machine of course it was very crude when I was there, it was not finished.

"XQ. When did he get that machine finished?



"A. It was the latter part of the peach season when he tried it out; there was not over half of the help there when we tried it; the season was just coming to a close.

"XQ. How many of the conveyor belts were there in the machine when it was completed?

"A. Conveyor-belts?

"XQ. Yes?

"A. *There was only one conveyor-belt; we had no line conveyor, just the machine.*

"XQ. You did not hear him say anything about a machine with two conveyors in it?

"A. No, but he told me that if he ever made it again he would make two or three in a row; that is what he said then; he said of course it would be a practical machine.

"XQ. Did you examine the machine carefully after it had been operated to see just what it was?

"A. Yes, quite critically because I put through the peaches and it done the work so well I thought that was quite plenty.

"XQ. But you didn't get into the insides of that machine to see just how it was done?

"A. Well, I saw it in the course of being built and I thought I knew a good deal about it; but I have no mechanical skill, you know, and I could not do anything with it.

"XQ. *Was there any lye-tank for delivering the peaches into this belt machine?*

"A. No.

"XQ. Where was the machine set up and operated?

"A. Just in front of the engine room on the lower floor of the factory; they had to take it there to get the end of the shaft out of the engine room to get power.

\* \* \*

"XQ. *You are sure you saw only one machine there, are you?*

"A. Yes.

"XQ. How many peaches were peeled on it when you saw it?

"A. I peeled three bushels myself.

"THE COURT—Q. You ran the machine after it was built, did you?

"A. Mr. Campbell ran the machine and I prepared the peaches and put them through.

"MR. CHAPPELL—XQ. That was all the machine was operated when Mr. Campbell operated it?

"A. Yes" (R. 622).

"MR. CHAPPELL—XQ. Do you know what a friction gear is?

"A. Yes, I know, because he told me at that time.

"XQ. Did you see any friction gears used by Mr. Campbell?

"A. Yes; and he said if he ever made another machine he would never have a friction gear on it; *but there was a friction gear on the one he made, a friction pulley; that was for the driving of the revolving brushes.*

"XQ. Did he make that gear himself?

"A. I don't think he made it; I think he got it made up town somewhere, I don't know that either. I never saw it until it was on the machine.

"XQ. Was there any belt to drive this machine?

"A. Yes, there was a belt from the driving pulley and then there was a belt from that to drive the *friction* pulley.

"XQ. Where was the connection to the water?

"A. He got that—in the tryout we had a rubber hose there, and I think that we got the water from the engine room; I am not sure about that either, but it was brought to the machine by a rubber hose.

"XQ. Then after that how was it done?

"A. It never was done after that as far as I know; so far as I know, I put all the peaches through it that was ever put through it" (R. 626).

It will be noted that Brunker says there was no lye-tank for the machine, thus confirming the testimony, on that point, of S. J. Dunkley.

It will also be noted Brunker states that *friction gears* were used in the model machine. Regarding the use of same, Melville Dunkley testified:

"XQ. Are you willing to state that that first machine was not driven by use of friction gears?

"A. *No, I would not say.*

"XQ. As a matter of fact, it was driven by a friction gear, isn't that correct?

"A. *I don't know.* I could not say; I have an idea it was driven by gears, but as to the manufacture, the building of that machine, I could not remember" (R. 436).

S. J. Dunkley, the alleged inventor, on the same subject, said:

"XQ. What kind of gears were used in that model?

"A. *I could not say that*" (R. 493).

In our opinion, the failure of the Dunkleys to recollect the character of gears used in the model machine, was not due to any actual lapse of memory on their part, but was merely due to a reluctance to *admit* the use of friction gears therein, whereas, on the other hand, they were afraid to positively *deny the*

*use of the same. Throughout their testimony the same reluctance to admit facts, of which they dared not deny the existence, is discernible. Said reluctance is especially noticeable in regard to their pretended failure to remember who worked on and operated the machines and from what firms parts thereof were bought.*

The friction gears, used in the model machine, were made by E. B. Mapes in his machine shop in South Haven. Mapes' original book of entries, containing his accounts with the Dunkley Company, was offered in evidence as "Defendant's Exhibit BB, Mapes' Account Book." (R. 649.) Mapes said:

"MR. WHITE—Q. State whether or not you find in that book an account with the Dunkley Company for the year 1903, and, if so, on what page you find it?

"A. I could not give you the page, that is, I could not, without referring to the book.

"Q. Turn to page 77.

"A. Yes, I have an account here.

"Q. How is that account headed?

"A. Dunkley Canning Company.

"Q. What is the first item—under what date?

"A. For tapping in 3 three set screws, 35 cents.

"Q. What is the date of that item?

"A. July 4.

"Q. Of what year?

"A. 1903.

"Q. Now, begin with the item opposite September 28 and please (read) the items in that account up to and including the item opposite October 6; just read the date and the entry and the amount?

"A. September 28, to 2 iron pulleys for *peach-washer*, \$2; 28th again, 6 hours' time on *peach machine*, \$2.40.

"September 29, 6 ditto, \$2.40.

"The same item on the 30th, 6½ hours' work and 2 pounds of babbits, the total would be \$3.00.

"October 1, 1½ hours' time, 2 ⅜ set screws, 70 cents.

"October 1, bore 2 pulleys, 60 cents.

"October 3, cutting shaft one hour, 40 cents.

"October 5, 3 hours' time, \$1.20.

"Then it is carried over to page 87; *October 6, Mapes' time on friction, 8 hours, \$3.20.*

"*Leather for friction, \$1.00.*

"Q. That is sufficient. Now, state if you know what that item of friction refers to?

"A. Well, that item of friction refers to 3 pulleys really, the friction surfaces that come in contact with one another.

"Q. *Who gave you the order to make those friction pulleys?*

"A. *Mr. Stewart Campbell.*

"Q. Do you know what they were made for?

"A. Yes, I know what he told me they were for.

"Q. State whether or not after making them you ever saw them?

"A. I saw them on a machine they were put on.

"Q. *What was that machine?*

"A. *It was supposed to be a peach-washer*" (R. 637).

"MR. CHAPPELL—XQ. When did you see the peaches put through that machine?

"A. Well, I could not give you the exact date; I saw it some time in the fall after that.

"XQ. The fall—after October, you mean?

"A. Yes, after the stuff was made, but I was in there later on.

"XQ. When did you see a machine before that?

"A. *I never saw one before that; that was the first sight of the machine*" (R. 639).

Regarding the test of the model Exhibit 10, after its completion in October, 1903, Campbell said:

"Q. Before you go to your other machine I will ask you to state whether or not any test of this first machine was made, and if so what were the circumstances?

"A. Yes, we made a test right at the finish; I ran it through with Mr. Brunker; Mr. Brunker prepared the lye and peaches and I poured them into the end of the machine, and they shot through and dropped out into a tank of water and they were perfectly satisfactory in every way; that is it did good work, and I showed it to Mr. Dunkley and he seemed impressed with it and said it was all right; some time after that he suggested that we build a machine that would do just about three times as much.

"Q. What was this vessel in which Mr. Brunker heated the solution for the peaches at the time of the test?

"A. I am not clear as to that; my recollection is that it was a pan.

"THE COURT—Q. A pan?

"A. Just a pan.

"MR. WHITE—Q. Where was the solution heated, by what means, at that test?

"A. It was heated on a gasoline or gas stove, I don't know which now, right in the same room where I made the test.

"Q. What connection if any between the stove and the pan thereon and the machine which was being tested?



"A. No connection between them; the stove set, I should say, about 30 or 35 feet away from the machine, I guess, when the lyeing was done, between the office and the stairway, going up from the room.

"Q. *About what time was this first test of the machine made?*

"A. *It was made along late in October.*

"Q. *In what year?*

"A. *In 1903.*

"Q. Now to what extent was the machine tested out with respect to the number of peaches put through that machine?

"A. I don't remember exactly, two or three bushels.

"Q. Then after that when was this machine used again?

"A. I don't remember of that machine ever being used after that.

"THE COURT—Do you mean to say it never was?

"A. It never was to my knowledge" (R. 532-534).

That the model Exhibit 10 was never used after 1903, is also shown by the testimony of Melville Dunkley, who said:

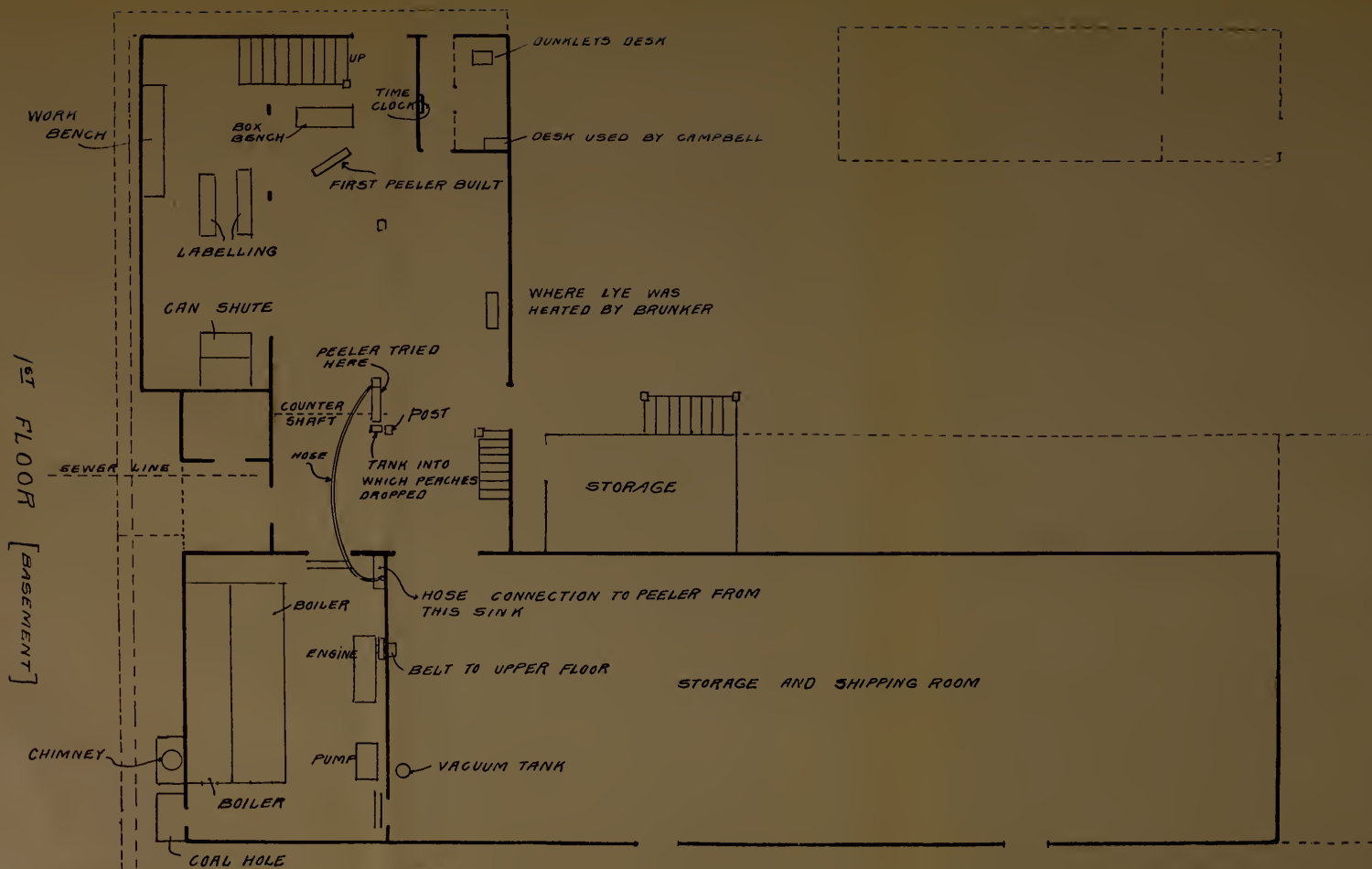
"XQ. Was it ever used after 1903?

"A. I think not.

"XQ. Are you sure?

"A. *I am quite sure*" (R. 443).

The foregoing merely shows the experimental nature of said model and that it was never built with the idea of using it commercially. As said by Brunker, it was a crude device and was never used commercially.



1<sup>ST</sup> FLOOR [BASEMENT]

WORK  
BENCH

BOX  
BENCH

FIRST F

LABELLING

CAN SHUTE

PEELER  
HERE

COUNTER  
SHAFT

HOSE

TAIL  
WHIP  
DRUM

SEWER LINE

BOILER

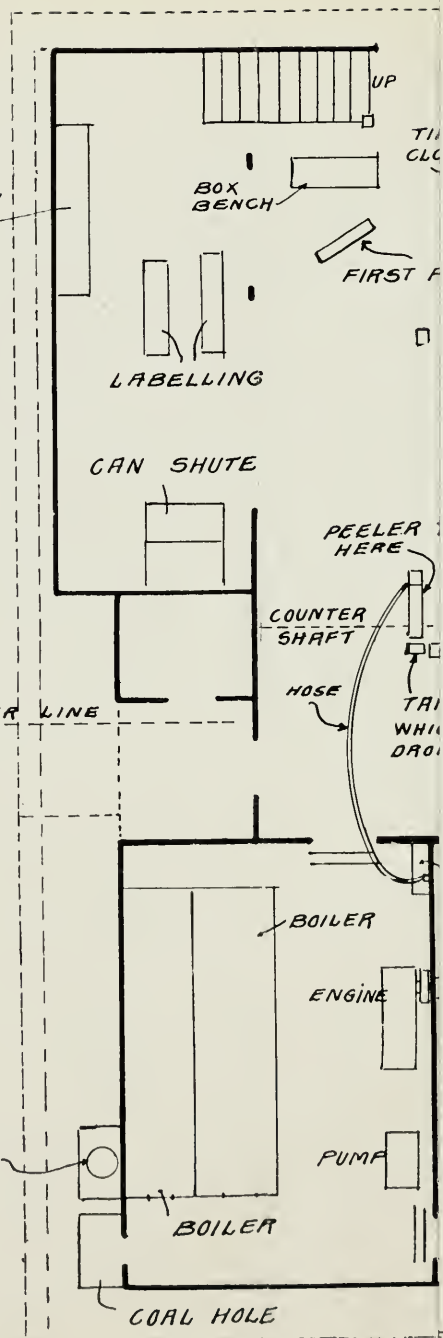
ENGINE

PUMP

CHIMNEY

BOILER

COAL HOLE



On the opposite page is a reproduction of an enlargement of one of the Campbell drawings forming part of "Defendant's Exhibit AA." (R. 544.) Such drawing discloses the floor plan of the basement in the Dunkley Company's cannery in South Haven in 1903. On the plan are indicated where model Exhibit 10 was built by Campbell and where it was first tested in October, 1903.

Regarding the manner in which the friction gears were mounted in the model machine, Campbell said:

"A. The mode of fastening them there, I cannot remember exactly; but I think they were on a kind of wooden bracket, I would not be certain. That part of it I don't remember. \* \* \*

"A. \* \* there is (are) holes on the top of that back frame that there might have been a bracket extended out to hold it, but I could not say; *my recollection was that there was wooden brackets put in there between the top and bottom and extended out and bolted, like sawed out of a plank; I could not say positively; \* \**" (R. 592).

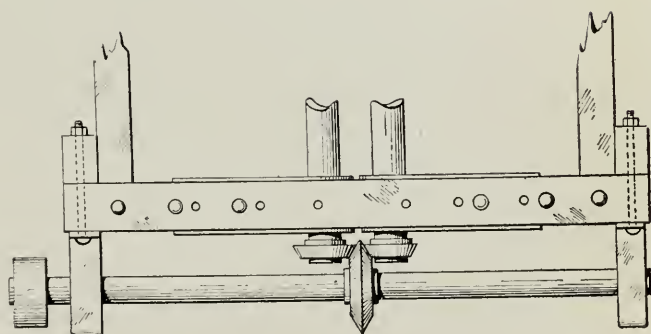
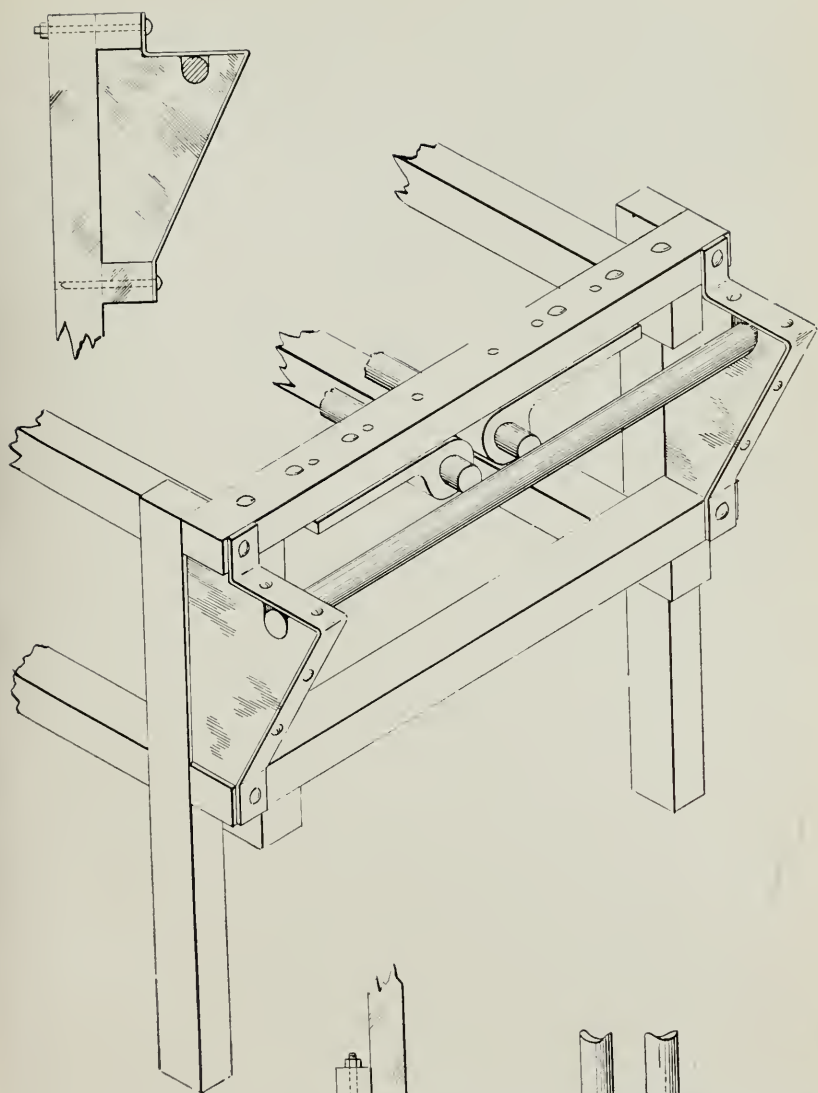
For the purposes of the argument, we had made three drawings illustrating the friction gears and the manner in which they were mounted on a shaft supported in the two wooden brackets, according to Campbell's recollection, although he was not positive as to such details. Said drawings are reproduced <sup>134</sup> on the opposite page. The bolt holes in the frame, as mentioned by him, are in the Model Exhibit 10 and there appears to be no reason to doubt the accuracy

of his recollection. Campbell's refusal to state positively the precise manner in which said gears were mounted in the model machine, although it would have been a simple task for him, or any ordinary mechanic, to suggest any number of ways of attaching them to the machine, merely indicates the sterling honesty of the man. Throughout his testimony, it is to be noted he does not hesitate to frankly so state when he fails to remember any fact inquired about. Neither of the Dunkleys even remembered what kind of gears were used in the model machine. As said by the alleged inventor, S. J. Dunkley, on said point:

"XQ. What kind of gears were used in that model?

"A. I could not say that" (R. 493).

The foregoing comprises an analysis of all the proofs respecting the date of building of the Dunkley experimental model machine. As Dunkley claims said model was made *in the same month* in which he *conceived* the invention (R. 479 and 495), it is quite apparent that Dunkley's *date of invention* must be deemed, for all practical purposes, to be *the approximate date of the commencement of said model machine*. We believe we have demonstrated that the building of said model machine did not commence until after the beginning of the 1903 peach season in August of that year, and that it was not completed until after October 6, 1903. Of course, the Dunkley







testimony, in the Dunkley-Beekhuis interference proceedings, fully corroborates our contention that said model was not made until 1903. It is to be noted, however, that, in said interference proceeding, Dunkley fixed his *conception date* as August, 1902. The testimony of Campbell and Brunker herein, proves that the *conception* of the invention did not occur until one year later, to wit, in August, 1903.

Many patent attorneys have noted the tendency, on the part of inventors endeavoring to carry their dates back of the true dates, in order to overcome an anticipation, to carry them back just one year or just two years, and so on. By so carrying the dates back, the inventor's whole story need be changed only in respect to the *year* in which any event occurred, but the sequence of events is not thereby changed or disturbed or the particular month, in which any event occurred, changed. It is, therefore, apparent that, by carrying a whole series of events back one year or for some multiple of a year, the witness, without much chance of being tripped up, is enabled to protect himself against the most severe cross-examination by one not knowing the truth. Fortunately for us, we knew the truth in the present case.

In the interference proceeding Dunkley knew, before the declaration of interference in July, 1909 (R. 831), the filing date of the Beekhuis application. As said date was May 25, 1904, Dunkley undoubtedly thought that, in order to win, it would be sufficient

to carry back the date of completion of his model machine to July, 1903, from October, 1903, the true date of completion. However, he apparently thought it prudent to carry the *date of conception* back a *whole* year to August, 1902, and he evidently felt secure in doing so, because he could rely merely on his own and his son's testimony to prove such *date of conception* without much chance of the opposing party disproving the same.

#### DATE OF BUILDING DUNKLEY'S FIRST COMMERCIAL MACHINE.

After the test of the model machine in October, 1903, Campbell started to work on the first commercial machine. Said machine comprised three endless brush belts for respectively conveying three lines of peaches between sets of rotating brushes and, therefore, said machine was spoken of as a "*three-line machine*." Campbell made the drawings for the lye-tank to be used with the brush-spray mechanism therein and the same were turned over to the Clark Engine & Boiler Company of Kalamazoo for use in making such tank. (R. 537.) As said by Melville Dunkley:

"XQ. Did Mr. Campbell make the drawings for the lye-tank for the first commercial machine?

"A. No, I do not think there were any drawings made—for the first commercial machine?

"XQ. Yes.

"A. *He might have*" (R. 458).

Regarding the date when said lye-tank was delivered by the Clark Company, Campbell said:

"A. It was delivered January 30, 1904.

"Q. At what place was it delivered?

"A. At the factory in Kalamazoo" (R. 537).

The gears for the first commercial machine were purchased by Campbell in Boston, Massachusetts, from the Boston Gear Works in December, 1903. (R. 538.) As said by S. J. Dunkley:

"Q. In the month of December, 1903, did you buy any gears from the Boston Gear Works at Boston?

"A. I shouldn't wonder but what we did, for we were building some machines, *I think Campbell was at that time*; I think he was building a complicated syruper-machine" (R. 500).

The carrier-chains, used in the lye-tank for such commercial machine, were purchased in part from the Jeffery Company, Chicago, and part from the Weller Manufacturing Company of Chicago. (R. 540.) Campbell furnished the foregoing information regarding the various firms from whom said parts of the commercial machine were purchased. The Dunkleys, on whom was the burden of proof, were quite reluctant to give any information which could be used to check up the accuracy of their testimony. They fully appreciated the wisdom of the saying that "Silence is golden." Regarding the construction of said machine, Campbell said:

"Q. Now go on with the history of any peach-peeling machine you had knowledge of at the time at the Dunkley factory?

"A. After that season, after the tryout of the small machine, I had several machines on hand to build, and *one of these was a triple machine, peach peeling machine*. The lye machine I built; I made the drawings of the frame work of the triple machine, I don't remember whether I built the frame work or had it built, but I think we had it built in Kalamazoo and shipped over to the factory; but that was constructed during what we call the winter season or the season between the canning seasons and was shipped down to South Haven along with other machines and I erected them and finished them there and they were put into operation along about the 1st of September—along in the 1st of September.

"Q. In what year?

"A. Of 1904, the following year.

"Q. Up to the first of September, 1904, how many peach peeling machines had you built there at the Dunkley factory in Kalamazoo or South Haven?

"A. *Just the two, the single model and the triple model*" (R. 536-7).

On the same point, Melville Dunkley said:

"XQ. *Prior to November 1, 1904, had the Dunkley Company built more than these first two machines, to wit: the experimental model machine and the first commercial machine?*

"A. *I could not say that they had*" (R. 449).

On the same point, S. J. Dunkley said:

"XQ. *When was the third peach peeling machine made by the Dunkley Company?*

"A. *The third?*

"XQ. *Yes, counting the experimental model as the first?*

"A. *I could not say as to that*" (R. 500).

As indicating Melville Dunkley's reckless disregard for the truth, we call attention to his direct testimony to the effect that, in addition to the experimental model machine and the first commercial machine, more of such peach peeling machines were built in the winter of 1903 and 1904. He says:

"In 1903 and 1904, that is in the winter of 1903 and 1904 we built more of the machines and installed them in the South Haven factory. These first two or four machines were built with wooden supports, etc." (R. 417).

On cross-examination, he was compelled to admit that, up to November 1, 1904, only two of said machines had been built, to wit: the experimental model machine and the first commercial machine. (R. 449.) Can such character of testimony, even though it were not flatly contradicted, be properly held to establish a case *beyond a reasonable doubt* or a case *substantially free from doubt*?

Regarding the installation and first use of the commercial machine, Campbell said:

"A. The first commercial machine was placed on the second floor right in the same position as this peach peeling table; *they took out a great part of this peach peeling table to place the peel-*



*ing machine and the lye machine and the pitters,* and they delivered the stuff onto the remainder of this peach peeling machine (table) as a sort of *inspecting table*, but I don't remember just how much was left, probably twenty or twenty-five feet.

"Q. When was that commercial machine *first used*?

"A. I left there the 3rd of September, 1904; I tried it out there; we probably ran anywhere from 5 to 20 bushels, I could not say exactly the number of peaches, through it.

"THE COURT—Q. When was it put in operation?

"A. The operation of the *try-out* is all I know about, *it was not in regular use for the season when I left there.*

"Q. When was it put into operation, I say?

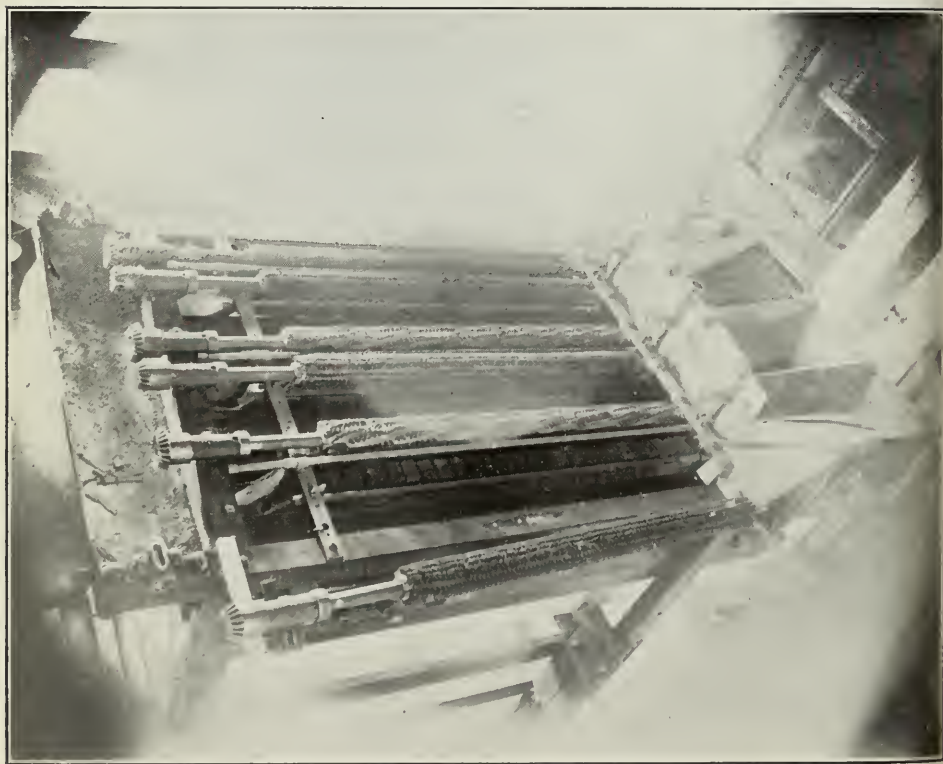
"A. In September—well, August, probably—a couple of days before I left—it would be in August of 1904; the commercial machine" (R. 541-2).

Regarding the date when Campbell left the Dunkley Company's employ, S. J. Dunkley said:

"A. \* \* \* he left in August, 1904; \* \* \*"  
(R. 432).

It will be noted that the very last thing done by Campbell, before leaving the Dunkley Company's employ in 1904, was to try out the first commercial machine. It is apparent, therefore, that he cannot be mistaken as to the date of completion of said machine *just prior thereto*. Of course, Bruncker's admitted period of employment, in 1903, absolutely fixes the





date when the model machine was made, as it was made while he was in South Haven. Furthermore, Brunker could not be mistaken regarding such model machine, as it was the only peach peeling machine there while he was there. As he said:

"XQ. You are sure you saw only one machine there, are you?

"A. Yes" (R. 622).

Brunker further identifies said model machine as having only *one conveyor belt*, and states *no peaches were commercially peeled on such a machine while he was at South Haven*.

On the opposite page appears a cut of the first commercial machine which contained three brush belts. Said cut is a reproduction of "Defendant's Exhibit S." (R. 445.)

The *logic* of the sequence of events, as testified to by Campbell, Brunker and Mapes, is fully corroborated by the filing date of the Dunkley application for the patent in suit, to wit: November 29, 1904. In other words, the filing of the application on that date was in strict accord with the ordinary rules governing human conduct. The experimental model machine was built during the 1903 peach season and tested in October, 1903, *near the end of that season*. It was, of course, impossible to then build and complete a commercial machine in time for use during such season. Furthermore, it was perfectly natural for S. J. Dunk-

ley, even though he fully believed he had a patentable machine, to delay filing an application for a patent until he did have a *complete* working machine upon which to base his application for a patent. It will be recalled that Melville Dunkley said the Dunkley patent drawings are based upon such first commercial machine. (R. 448.) When S. J. Dunkley did have such commercial machine completed, about September 1, 1904, it was perfectly natural for him to promptly arrange for the patenting of the same and, therefore, in getting his application on file on November 29, 1904, a short time after the completion and public use of such commercial machine, Dunkley was acting in accord with ordinary human conduct.

We have heretofore commented on the fact that Campbell did not hesitate in giving the names of the various business houses from whom were bought the parts of the model Exhibit 10 and of the first commercial machine. No one, not feeling absolutely sure of his ground, not feeling absolutely certain of the substantial accuracy of every statement made by him, would have followed such a course. Regarding his Eastern trip, made in February, 1916, at the request and expense of defendant and, part of the time, in company with the writer of this brief, Campbell said:

“MR. CHAPPELL—Q. You have been in Kalamazoo and in South Haven recently, have you not?

"A. I have been in Kalamazoo, yes, in February.

"Q. What was the purpose of your trip there?

"A. I went there to check up my ideas on this, and secure what evidence I could get in regard to it.

"Q. Where did you go?

"A. I went to Chicago, first; then I went to South Haven, and I went up to Kalamazoo and up to Lansing, down to Detroit and back again; I did not go to Detroit particularly on this.

"THE COURT—Q. On whose behalf?

"A. I went on my own behalf to Lansing and Detroit.

"Q. Did you make this trip back on your own behalf?

"A. No, I went for Mr. White.

"Q. You were sent back?

"A. Yes.

"MR. WHITE—Q. Who was with you on the trip after you got to Chicago?

"A. Mr. White was with me from Chicago.

"THE COURT—Q. You went at their expense?

"A. Went at their expense.

"MR. WHITE—We employed him for the purpose of the investigation and assisting in it.

"MR. CHAPPELL—Your memorandum was not quite sufficient to refresh your recollection, then—is that right?

"A. It proved that my recollection was correct in every way.

"Q. In what way did it prove it, if I may ask?

"A. *It proved it by all these details, the stuff that I bought in different places checked up correct with my memory as to the time, every one of them, without exception*" (R. 587).

Campbell's Eastern trip, in and by itself, corrobora-



rates his testimony herein. His efforts, on said trip, to locate and secure corroborating documentary evidence is in marked contrast to the attitude of the Dunkleys, as expressed in S. J. Dunkley's testimony:

"MR. WHITE—Q. Have you made any effort to secure any records proving any of the dates regarding the making or using of any of these peach peeling machines and if so, what efforts have you made?

"A. I do not remember making any particular efforts. I think my son did" (R. 503-5).

A man does not search for genuine documentary evidence to prove falsehoods. A man, when telling a series of falsehoods, does not refer to numerous places where documentary evidence can be located and used for checking up the accuracy of every statement made by him and possibly even used to convict him of perjury. As stated before, Campbell's course is in marked contrast with the course pursued by the Dunkleys. He searched for documentary evidence; they did not. He specified all the firms from whom the parts of the model "Exhibit 10" and the parts of the first commercial machine were bought; they sought the usual refuge of the man not telling the truth—a lapse of memory.

Whatever reputation defendant's attorneys may or may not have for honesty and integrity, the Court can, at least, safely assume they are possessed with some degree of intelligence. Would any attorney, or any

man, unless insane, dare arrange to have Campbell, Bruner and Mapes give the testimony they did give, if the same is false? Of course, not one of said witnesses could possibly appreciate the significance, in this case, of any date given by any one of them. In fact, no one connected with the defendant's case, other than defendant's attorneys, could possibly appreciate the significance of said dates, as the same are important solely in respect to the several dates of the occurrences pertaining to the history of the Grier invention. Neither Campbell nor Bruner nor Mapes could possibly know, unless told by one of defendant's attorneys, that it was of any importance or significance in this case, that the Dunkley model machine was not made until 1903, or that, during the 1903 peach season, no peaches were commercially peeled on such a machine, or that all peaches, commercially peeled at the South Haven cannery in that year, were hand-peeled by women sitting at the long peeling table, or that the first commercial machine was not completed or put into use until 1904. In other words, said witnesses, unless elaborately coached, could not have misrepresented the truth in regards to all said facts so that such misrepresentation would advantage the defendant herein. Furthermore, said witnesses by reason of defective memories, could not have innocently so misrepresented the truth in regards to all said numerous facts. It would be too remarkable a coincidence for such an innocent mistake to have been made by them

and, at the same time, be of such importance in the defense of this case.

It will be noted that defendant offered in evidence numerous photographs produced by Campbell and disclosing a large number of the South Haven employees of the Dunkley Company in 1903. If Campbell was not telling the truth in regard to what machines and devices were in that company's plant in 1903, is it conceivable he would produce said photographs disclosing not less than seventy-five persons in a position to contradict him? And it is quite certain that a large number of said persons can be and will be located and will be able to testify regarding the Dunkley machines, if the Department of Justice, at the suggestion of this Court, will undertake an investigation of the facts testified to by Campbell. Furthermore, Campbell, as well as defendant's representatives, will welcome such an investigation of the truth.

Undoubtedly this Court fully appreciates the fact that parties to patent infringement suits frequently find it necessary to rely on the testimony of total strangers in regard to prior art matters. Said strangers usually have no interest in the litigation and are very reluctant even to be called as witnesses. Of course, when they are called on to give up their time in searching for evidence and giving other assistance, they usually and rightfully demand compensation for their time and trouble and for the annoyance to which they are put. In the present case, Campbell not only did a

great deal of work for the defendant, in respect to locating old photographs, documentary evidence and witnesses, and making many sketches and drawings and furnishing defendant's attorneys with an immense amount of detailed information, but he temporarily gave up his position with the Southern Pacific Company, and, in the middle of winter, made the Eastern trip in search of further corroborating proofs. He also made trips to Sacramento to locate Brunner and later to introduce him to one of defendant's attorneys. On his Eastern trip, Campbell, for a part of the time, was accompanied by the writer of this brief. For his foregoing services, Campbell received the sum of five hundred dollars and the expenses of the trips. (R. 595.) In view of the value of his services and the time devoted by him in the performance of the same, and especially in view of the necessity of having him temporarily give up his regular employment, said compensation was extremely reasonable, and one could not expect him to accept a less amount. Brunner received the sum of \$25.00, out of which he had to pay his expenses of coming here from Sacramento. (R. 630.) Although it does not appear of record, Brunner after leaving the witness stand, was paid an additional sum of \$10.00, due to the fact that he was kept away from his business a day longer than he expected. Mapes made the trip to California for the expenses of same. (R. 646.) He had never been to California and, therefore, the trip naturally appealed to him.

(R. 649.) If the said compensation of said witnesses is to be considered in respect to the weight to be accorded their testimony, then the testimony of the Dunkleys must be weighed with the fact in mind that, according to plaintiff's own showing in this Court, hundreds of thousands of dollars are at stake in this litigation. After the Grier proofs were in, plaintiff's representatives knew the case was lost unless the Dunkleys carried back the dates of Dunkley's activities respecting his invention. Therefore, regarding the Dunkley evidence on this phase of the case, the following remarks of Mr. Justice Bradley, in the case of *Clark Thread Co. v. Willimantic Linen Co.*, 140 U. S., 488, are most pertinent:

"No person accustomed to weigh the credibility of human testimony can fail to perceive the stress under which this evidence was given \* \* \* We feel bound to put this strict construction upon the patentee's evidence because such testimony, given for the purpose that this was, is necessarily subject to the gravest suspicion, however honest and well-intentioned the witness may be."

We desire to call attention to the exhaustive cross-examination to which Campbell, Brunker and Mapes were subjected, not only by opposing counsel, but by the lower Court. Campbell was alternately questioned by opposing counsel and by the lower Court along entirely different lines of inquiry. Throughout such severe examination, Campbell quickly, frankly and

without hesitation or evasion answered every question propounded. His manner and demeanor on the witness stand is clearly indicated by his answers and remarks under a most trying ordeal. No man, not telling the truth, could have possibly testified as Campbell did. We trust every word of his testimony will be given most careful consideration. The lower Court's attitude towards Campbell is incomprehensible to us unless it can be explained as hereinafter suggested.

The questions asked Campbell, Brunker and Mapes by opposing counsel were undoubtedly prompted by information received from the Dunkleys. The nature of said questions indicates that the Dunkleys, when seated at the counsel's table, had a much better recollection of the 1903 and 1904 transactions than they did when *previously* on the witness stand. For instance, Mr. Chappell asked Campbell the following questions:

"XQ. Do you remember working at any time on a sealing material on cans?

"A. I did.

"XQ. When did you work on that?

"A. I started some of that in South Haven and finished it in Kalamazoo.

"XQ. Did you get that to work?

"A. I got my part to work, yes.

"XQ. Did the thing prove to be a success?

"A. I do not think so; I do not know; I had nothing to do with the material they were using; they would merely bring in the material to me and



have me put it on to these can tubes and order me to put it on the can tubes, and they kept changing the material all the time and I had to keep changing the machine; I do not think while I was with them it ever was a success.

"XQ. When did you work on that?

"A. I worked on that in 1903 and 1904.

"XQ. At what place did you work on that?

"A. I was working on that in 1903 and 1904; I am pretty sure it was 1903 and 1904; what place?

"XQ. Yes?

"A. I worked in South Haven and Kalamazoo on that.

"XQ. What place did you work the longer?

"A. In Kalamazoo.

"XQ. Can you indicate the particular room you worked in?

"A. Yes, my work was done in—it is the second floor, I would call it, in the building on the wing; *I had a room there all to myself with my big drafting table, architect's drafting table that I bought and placed in there to do my drafting thereon; I had that room all to myself on the second floor, and that is where I did my experimenting on that machine*" (R. 576).

The foregoing indicates the nature of all Campbell's work while in the employ of the Dunkley Company after the first month or so, when he did some electric wiring. How strange it is that the Dunkleys had so much difficulty in recollecting that Campbell built the peach peeling machines. Furthermore, how strange it is that the Dunkleys were able to produce such an insignificant bit of documentary evidence as Brunker's letter to the company, yet did not

produce documentary evidence corroborating their own testimony as to the most vital matters.

Regarding the machines built by him, Campbell said:

“XQ. Please indicate the order in which you designed those various machines to which you have referred, which first and which second, and so on?

“A. I don’t know as I could give them exactly, because I would start something and finish them after others, but the syruper was, I think, the first machine, in fact, I am pretty positive it was the first machine started, this automatic syruper in Kalamazoo; the cooker in South Haven came next; then the improvement on cherry pitters came next, as I remember; the improvement on cherry pitters was made in 1902; in 1903, cherries were pitted in Kalamazoo; then there came the peeler; wait a minute, the sorter was partly built in 1902; I won’t say built, it was devised and thought of and parts of it tried out, that is, the experimenting of how it would act on the peaches was tried out; but the sorter ran clear through this until 1904, and it was not completed then; then this model peach peeler in 1903—no wait a minute; there was a machine in 1903 for cutting celery—that was in December; the first work was done. I think, in the first part of December, 1903; so that machine must have been built before; that machine and this model peeler came pretty close together; then the lye machine; that peach pitter and the triple commercial machine were along in together, 1903 and 1904” (R. 573).

Campbell stated that he designed certain of the said machines so built by him and his contention, in that regard, was said by the lower Court to be in-

credible. *Of course, it is absolutely immaterial in this case, whether or not Campbell was the inventor of any of said maachines, even the peach-peeling machine.* Whether he or Dunkley conceived said machine in August, 1903, is of no moment. Prior to that time, Grier had two anticipating machines in commercial operation in California. Therefore, defendant made no effort in this case to establish the fact that Campbell was the one who actually did design the Dunkley peach peeler, although admittedly Dunkley told him generally to build such a machine to do the work which Bruncker had done by hand, to wit: remove the disintegrated skin from the peach by subjecting it to the action of brushes and water. That Campbell certainly worked out the details of construction of the peach peeling machine, is shown by the testimony of the two Dunkleys, both of whom were unable to give such details. S. J. Dunkley's ignorance regarding such details is indicated by the following answers given by him:

"MR. WHITE—I direct your attention to this 'Plaintiff's Exhibit No. 10' and ask you what function in the operation of the machine, did these gears perform which are on the shaft on which the pulley at the other end of the machine, is mounted?

"A. I presume, if there is gears there, to help turn the brushes.

"Q. Do you know?

"A. *No, I do not know*, it is a simple enough machine; anybody could judge by looking at it" (R. 496).

The following is an example of Melville Dunkley's recollection of such details of the model machine:

"Q. As a matter of fact, it was driven by a friction gear, isn't that correct?

"A. *I don't know; I could not say; I have an idea it was driven by gears; but as to the manufacture, I could not remember*" (R. 436).

It is sometimes a close question as to who is the real inventor of a very simple machine; the man who suggests the general idea of making such a machine to perform a certain function, or the man who, from such a suggestion, combines together the necessary, but very simple, mechanical elements and movements to perform such function. Either might well contend and honestly contend, he was the inventor. Therefore, no emphasis was placed on Campbell's contention that he designed the Dunkley peach peeler. We believe his testimony, in that regard, is absolutely true, but, as a defense, said contention was not relied on herein and was not pleaded. However, it very naturally was disclosed by Campbell when he was giving the history of the Dunkley peach peeler. Even though the lower Court was unable to give credence to such contention, there was no reason for it to reject the whole testimony of Campbell by reason thereof. As Campbell actually built the first two peach peeling machines and must have supplied many of the details of construction thereof, the lower Court could

at least have taken the view, that it was not an unnatural thing for him to really believe he invented the same, although as a matter of law, it might be considered that Dunkley's general suggestion was sufficient to constitute him the inventor.

That Campbell had the ability to invent the peach peeling machine is admitted by the Dunkleys. As stated by Melville Dunkley, Campbell was known "*as more or less of a genius*," and was actually employed to invent and develop new machines. (R. 456.) Furthermore, it was admitted that Campbell invented machines far more complicated than the extremely simple peach peeling machine, and it was not denied, that practically all his time was devoted to the designing and building of new machines.

It is admitted by Melville Dunkley that Campbell invented the complicated automatic syruper. It is also admitted by him that Campbell invented the complicated peach-pitting machine. (R. 457.) Campbell states he never completed the peach-sorting machines, originated by him. (R. 560.) Presumably they were a failure, so Campbell is not taking much credit to himself when he says he originated them. The cooker, enlarged by Campbell, was merely a wooden tank about five feet wide and eighty feet long. He thought the tank was made by the Windmill Company in Kalamazoo. (R. 575.) The water in the tank was heated by steam coils and the filled cans were carried through the water by carrier chains run-

ning over gears. It is evident that most of such mechanism, such as the chains, gears, etc., could be bought in the open market. The building of said cooker, therefore, was more of an assembling job than anything else. Campbell admits the improvement made by him on the cherry pitters was small. He says: "What little improvement I made on the cherry pitters was done at South Haven; the early improvement on the feed, the clearance of them." (R. 574.) The building of the peach peeling table required no more than the ability of an ordinary carpenter, and Campbell says he built a whole house complete in the '80's. (R. 554.) No description of the celery cutter was given by Campbell, but presumably it contained a reciprocating knife of some kind. The lye-tank for the first commercial machine was also a simple structure and certainly the brush-spray mechanism of the peach peeler was not complicated. In view of the fact that Campbell was employed by the Dunkley Company for two and one-half years and that his work, during most of such time, was the building of machines, the foregoing is not a very imposing array of devices for him to say he originated. Melville Dunkley, as stated before, admitted Campbell was known as a genius and was actually employed for the purpose of inventing two machines. It would, therefore, be somewhat surprising if, in two and a half years, he did not invent additional machines. On the other



hand, S. J. Dunkley was, according to his own statements, a very busy man during those years; too busy, in fact, to give much attention to details. He was running canneries and promoting and running steamboat lines. Where he found the time or had the ability or experience to solve mechanical problems or work on the development of new machines remains a mystery. As between these two men, we respectfully submit it is much more probable that Campbell, the man actually working and building machines, was the one who originated all the new machines built during the period of his employment by the Dunkley Company. Yet Campbell does not pretend he originated all of said machines. He says in regard to the soup machine: “\* \* \* that originated with Mr. Melville Dunkley, as I understand it \* \* \*” (R. 539.) Regarding a part of the lye-tank for the first commercial machine, he said: “\* \* \* there is one part of the peeler, of the lye-machine, the tank or the supply pipe above the lye-machine, I merely indicated what I wanted for that, a tank with pipes in it for heating; I don’t remember of making a drawing for that; we did not absolutely need any drawing; it has to be a certain size; that was constructed by some of the other help, I think; I don’t know, I have an idea that Melville Dunkley had the handling of that; I would not be certain.” (R. 585.) In respect to the peach pitters, *not* invented by him, Campbell said:

"XQ. Did you ever see any pitting machine that Mr. Dunkley had produced?

"A. I did; I don't know whether Mr. Dunkley produced it; I saw one he brought there from the Kalamazoo plant, while I was constructing the apparatus in South Haven.

"XQ. You did not have anything to do with that construction?

"A. I did not.

"XQ. When did you see that work?

"A. I saw two or three peaches run through it; two or three I say, I don't know how many; I saw a few run through one of the machines; I understood he had several; I think I saw two machines.

"THE COURT—Q. Pitters?

"A. Yes, both pitters.

"XQ. When did you see these?

"A. In 1904, while I was setting up this apparatus, this peach peeling line in 1904, along in July or August, somewhere along in 1904" (R. 567).

Of course, there were many other machines used in the cannery with the construction of which Campbell does not pretend to have had anything to do, such as the vacuum machines, the double seaming machines, the automatic canning machines, etc., etc.

In view of the foregoing, we respectfully submit there is nothing incredible about Campbell's contentions as to the inventing or designing of the said few machines *so specifically mentioned by him*, attention being called to the fact that he did not make the preposterous contention that he invented *all* the machines

in the Dunkley cannery. Therefore, we respectfully submit, the following remarks of the lower Court, brought forth by a grossly incorrect statement of Campbell's testimony, are entirely unwarranted by the evidence:

"MR. MILLER—Yes, they do; but here he was working for \$2 a day and yet he says he was the man *who invented the entire line of machinery in that factory, all of them*, not merely one; the peach-peeling machine and *all the other machines that were there*; that he invented them and that he installed them for Mr. Dunkley.

"THE COURT—Mr. Miller, I do not think you need dwell upon those features of Mr. Campbell's testimony, because it is too improbable for me to give it any credence that he had all these conceptions and was the inventor of these machines. I do not pretend to say he was not there and did not do some work on them, but that he conceived these machines right out of his own head, that is too much for my credulity" (R. 690).

In other words, it was too much for the credulity of the lower Court to believe that a man admittedly known as more or less of an inventive genius and actually employed to invent and build machines for a period of two and a half years and admittedly the inventor of the most complicated of all the machines mentioned by him as his inventions, should have invented the other few machines so mentioned by him. Why should such testimony tax the credulity of the lower Court any more than plaintiff's contention that

S. J. Dunkley was the inventor of all the inventions respectively described in the *eleven* Dunkley patents offered in evidence as plaintiff's Exhibit 9? (R. 477.)

We believe the lower Court's attitude toward Campbell's said contentions regarding his own inventions caused such Court to reject all of his testimony, notwithstanding its most vital features were fully corroborated by Bruncker and Mapes. To us, there appears no other explanation of the lower Court's decision on this phase of the case.

#### SUMMARY OF ANALYSIS.

The foregoing analysis of the proofs, pertaining to Dunkley's date of invention, clearly shows that said proofs, under all the decisions, are insufficient to prove plaintiff's contentions regarding said date "*beyond a reasonable doubt*," or, in respect thereto, establish a case "*substantially free from doubt*." On the contrary, we submit said proofs conclusively show said date of invention to be subsequent to the beginning of the Michigan, 1903, peach season in August of that year. We further submit, that said proofs conclusively show that the Dunkley model machine was not completed until after October 6, 1903, and that Dunkley's first commercial machine was not completed until August, 1904. *It is to be noted that plaintiff did not risk recalling the Dunkleys or Schau to rebut the testimony of Campbell, Bruncker and Mapes.*

In view of the former contradictory testimony of the Dunkleys in the Dunkley-Beekhuis interference; in view of the many vital inconsistencies in their testimony herein; in view of their inability or deliberate refusal to give most important information regarding the Dunkley machines; in view of the total lack of any documentary evidence which, on its face, corroborates any of the said testimony; in view of the inherent improbabilities of said testimony and, finally, in view of the complete contradiction of said testimony by the direct, positive and unequivocal testimony of Campbell, Brunker and Mapes, how can it possibly be said, without affronting one's intelligence, that said testimony proves plaintiff's contentions *beyond a reasonable doubt*?

"Where one seeks to carry the date of invention back of the date of an anticipating patent, he assumes the burden of proof, and must establish an earlier date, *'by evidence so cogent as to leave no reasonable doubt in the mind of the court, that the transaction occurred substantially as stated'*."

*Moline Plow Co. v. Rock Island Plow Co.*,  
212 Fed., 727.

Has any Court in the land ever sustained a prior use defense on any such record as that pertaining to Dunkley's said alleged date of invention? As said by the Circuit Court of Appeals for the Second Circuit

in *Dey Time Register Co. v. W. H. Bundy Recording Co.*, 178 Fed., 818:

"The defendant having antedated the filing of the application by record evidence so convincing that it stands conceded, the burden is upon complainant to carry the date of invention still further back by evidence that convinces *beyond a reasonable doubt*. \* \* \*

*"The rule in such cases is very strict. It is so easy to fabricate or color evidence of prior invention, and so difficult to contradict it, that proof has been required which does not admit of reasonable doubt."*

## V.

### PRIOR INVENTION AND PRIOR USE BY GRIER.

Before discussing the Grier invention, we desire to call attention to the fact that the use of a disintegrating solution, as a step in the process of peeling peaches and other fruit, was known many years before the Dunkley application was filed, and such a process was in common use in California in the early nineties. "Defendant's Exhibit C" (R. 873) is a copy of United States letters patent No. 511,709 issued on December 26, 1893, to Ida L. McDermett for such a process. In said patent, the patentee says:

"In carrying my invention into effect, I prepare the solution by introducing one ounce of potash and one dram of alum into one gallon of water, and boil the latter until the potash and alum are dissolved; and into this boiling solution, I place



the peaches, pears or other fruit, and subject all to agitation until the skin of the fruit commences to break or peel, when the fruit is removed through the medium of a perforated dipper, basket or strainer, and is dropped or introduced immediately while hot, into a body of cold water, which completes the removal of the skin and removes a large portion of the solution from the articles."

Said patent, therefore, discloses the process of removing the peach skin by first subjecting it to a disintegrating solution and then dropping the peaches into cold water, whereby the skin is completely removed.

The Grier peach peeling machine is disclosed in the eight photographs and drawings appearing at pages 27 to 35, inclusive, of the record herein. The said machine includes a lye tank having an endless conveyor passing therethrough. By reason of the shape of said tank, the same was usually called a "*grass-hopper*." After being conveyed through the lye-solution in said tank, the *halved* peaches were discharged into an inclined trough-like structure mounted on arms and adapted to be *shaken* horizontally with an endwise movement whereby the peaches were bounced up and down, turned over and advanced to the discharge end of the shaker, where they dropped into a tank of water. Above the shaker were located a series of nozzles from which issued the water, under pressure and in the form of spray, which played on the peaches, passing along on the shaker, and thereby removed the disintegrated skin therefrom. As stated before, plain-

tiff admits that said Grier machine embodies all of the respective combinations of elements respectively covered by all of the Dunkley patent claims in issue. Therefore, the question of identity between the Grier machine and the Dunkley invention need not be considered. It is admitted. We are alone concerned with the date of the Grier invention.

In 1902, G. E. Grier and E. A. Taylor formed a partnership, under the firm name of Pasadena Canning Company, and leased the Pasadena Packing Company's plant at Pasadena, California (R., 304). During that year and for many years thereafter, said firm conducted a fruit canning business in said plant. During the same period, Mr. Taylor was operating the East Side Canning Company in Los Angeles.

During the peach peeling season of 1902, Grier conceived the peach peeling apparatus, afterwards built by him in 1903. At the time of his conception thereof, he disclosed the same to his wife and to Clarence L. Kennedy, then in the employ of the firm, Pasadena Canning Company. In April, 1903, Grier employed W. H. Finley to build two peach peeling machines, each embodying the said invention conceived by Grier in 1902. One of these machines was built for the Pasadena Canning Company and the other for the East Side Canning Company. In said month of April, 1903, Grier bought from the Berger & Carter Company of San Francisco two grasshoppers or tanks having conveyors therein, for use in the said two peach

peeling machines then in the course of construction. Said peeling machines were completed in July, 1903, and, *in that month*, one was installed at the Pasadena Canning Company's plant in Pasadena, and the other at the East Side Canning Company's plant in Los Angeles. After the East Side Company's machine was put into operation for two or three days at its plant in Los Angeles, it was found that the city water pressure was insufficient and, therefore, a pump for use therewith was purchased by the East Side Company from the Baker Iron Works of Los Angeles. The original bill for said pump is in evidence and, on its face, shows that said pump was delivered on August 3, 1903. The Pasadena Canning Co.'s. machine was also put into operation the latter part of July, 1903, and both of said machines were used continuously throughout the 1903 and many subsequent peach seasons. The water pressure in Pasadena, in 1903, was about 70 pounds during most of the peach season but dropped down towards the end thereof, so, in April, 1904, Grier also bought a pump for his machine from the Fairbanks-Morse Company of Los Angeles.

In 1904, Grier built two more complete peach peeling machines and also the shaker end for another. One of these machines was sold to the Orange County Preserving Company of Anaheim, California, and the other to the G. H. Waters Company of Pomona, California. The shaker device was sold to the G. H. Waters Fruit Company of Ontario. All of said de-

vices were delivered before the 1904 peach season and used during such season and subsequent seasons.

Grier states that he worked for the California Fruit Cannery Association in Los Angeles during the years 1890 and 1891. In the latter year he helped install an apparatus for peeling peaches by the use of the lye process. It consisted of a rack, supported on a crane elevator and adapted to be lowered into a vat containing the lye solution. The *whole* peaches were put in shallow trays on the rack, which was then lowered into and raised out of the solution. The rack was then swung over another vat, containing clear water, and lowered into it and raised and the peaches then would be subjected to a stream of water from a hose (R., 302-3). In 1893, he used a similar arrangement for peeling at the Southern California Packing Company's plant (R., 304).

In 1902, Grier installed a similar apparatus in the plant of the Pasadena Canning Company, and, at the first of the peach season, peeled only *whole* peaches by the use thereof. Later in the season, Taylor told him it was just as easy to use the apparatus in peeling *halved* peaches and demonstrated such fact to Grier. Regarding such incident, Taylor said:

"A. It was in August, 1902, that I first discussed the peeling of peaches in *halves*.

"Q. Give us the conversation that you had at that time.

"A. In August, one evening, possibly between four and five o'clock, I had a lot of cling peaches

all cut ready to peel, and my cutters at that time had been working hard, and they refused to peel any more that evening, so that I thought I would put them into the lye and see if it could peel them, the same as I did the whole peaches, which I did, and washed those—instead of putting them into three tubs, after moving them out from the lye, *I set them across the tank and washed them all out with the hose*, and by the time I had them through, Mr. Grier happened along there.

“Q. Give us the conversation that you had with Mr. Grier at that time?

“A. I asked Mr. Grier if he did not think that was a good thing, and he said he thought it was; he said after they were cooked, he would like to see the peaches; about two days afterwards he came in and I went and got a can and opened it in the office and showed him, and I can remember now the smile that came over his face” (R. 379).

Immediately after said conversation, Grier changed his method of peeling peaches by *halving* them before subjecting them to the lye-process (R., 305). In reference to making such change, Grier said:

“A. I conceived the idea right then of building a machine to do the work more rapidly, and the machine that I built in 1903 was the result of that conception” (R. 305).

CLARENCE L. KENNEDY worked for the Pasadena Canning Company in 1902. Regarding the method being used at that time by Grier, in peeling peaches, he said:

“A. They had two vats; they were about 2 feet wide and about 4½ feet long, I should judge about

18 inches deep, and one of them was filled up with the lye solution and the other filled up with water, and we dipped them by means of a pulley attached to a crate or basket, and—we lowered two baskets and raised them up and down in the lye and in the water we raised them up and down, and also used the hose on them.

“Q. In what form or shape or condition were the peaches?

“A. They were halves; they were freestone peaches; we also tried some whole.

“Q. Did you have any conversation with Mr. Grier at that time?

“A. Yes.

“Q. What?

“A. He told me to go in there and to look after that and to attend to that work, and to see if we could not devise some means whereby we could peel all of our peaches by the lye process or see if it could be worked out properly and we experimented on it in different ways, by using the lye in different degrees, weak and strong and so forth and different lengths of time in there and watched them to see the different conditions at different times, and in the washing of it to see how we could wash it, shake them up and down in the water, use the hose on them, and we found we could do it better by halved peaches than by the whole, that is the peach before it was halved” (R. 350).

Kennedy then goes on to say he, at that time, had heard of the use of the *Vernon* machine at Fresno and discussed the same with Grier (R., 351). On cross-examination he said:

“XQ. How did you come to know about the



Vernon machine in the peach peeling season of 1902?

"A. Well, I heard, it was in a general conversation—one way, it was through my brother, who was connected with the California Fruit Canners' Association, and through different people in the cannery business, we talked it over with; it was *general information*; I could not say exactly the number of people that told me about it, but *it was general information*" (R. 353).

It will be noted that, in 1902, the use of the Vernon machine, by the California Fruit Canners Association, at Fresno, California, was a matter of general knowledge to those interested in the cannery business. That fact alone was sufficient to start others working on *machines* for peeling peaches by the use of the lye process and it is, therefore, not surprising that Grier immediately got busy in attempting to also devise a machine for doing the same kind of work.

Regarding his conversation with Grier, Kennedy said:

"Q. Go ahead and tell us what was said by Mr. Grier in that connection?

"A. The first thing he told me was before I went down there to look into this, he and I talked it over and I heard previously that Mr. Vernon had a machine up at Fresno, and I told him while I was north shipping fruit I had a notion to go over there and see that machine, and he said, 'I had a notion to send you there, but did not,' and when I came home we talked this over and suggested to one another different ways of doing it. I remember particularly my idea of doing that

was to put it in a drum of some kind and roll it around with sprays of water upon it, something like the worm in the old grasshopper, something on that plan, and he did not think that was a good plan; he said his idea was to get them in under the spray somewhere where he could turn them over, agitate them, shake them, and we talked along about different ways, and he disposed (disclosed) the plan to me which he said he had, an idea to make a machine with a *shaker device to get these in under the sprays, shake them and turn them over, to get them on all sides*, and he thought my idea would not work, or he thought he could not get the sprays of water upon the fruit" (R. 351).

In 1903, Kennedy worked for the San Jacinto Packing Company of San Jacinto and, in 1904, for the Orange County Preserving Company at Anaheim (R., 352). Regarding the machine being used there in 1904, Kennedy said:

"A. It was a machine made by Mr. Grier; it was one of those *shaking* machines that used the grasshopper, used the caustic soda, and it was run from there on to this *shaker* machine, which ran it under the *sprays*, and washed it off, and then it went down into a tank with an elevator which run up and carried it out—I think there were three of these tanks, perhaps four—three anyhow.

"Q. In 1903, were you at any time in Mr. Grier's plant at Pasadena?

"A. Yes.

"Q. Do you know anything about whether or not he had any machines there?

"A. *He had; he had this machine of his laid (made) up, that we had been talking about.*

"Q. Can you describe the machine as you saw it down there in 1903?

"A. As near as I can remember it was the same identical machine that we had at Orange County Preserving Company in 1904.

"Q. You mean one just like it?

"A. Yes, just like it." (R. 352).

Kennedy's testimony as to Grier's conception, in the 1902 peach season, of his peach peeler, is corroborated by Mrs. Grier (R., 365-6).

J. R. LUSBY, a man sixty-five years old, testified that he was employed as bookkeeper by the Pasadena Canning Company from May 1, 1902, to September 29, 1903 (R., 275). He identified the Journal, Cash Book and Ledger of the Pasadena Canning Company and also the entries made therein while he was in the employ of that firm (R., 276-279). The said books were also identified by Grier (R., 286). The entries in said books, which are particularly relevant to the issues, have been copied into the record on pages 296 and 297.

Said entries show that, on August 1, 1902, the Pasadena Canning Company bought \$31.05 worth of caustic soda. On September 6th and 19th and on October 1, 1902, there was bought, in all, \$31.95 worth of caustic soda from the Model Grocery Company. Said purchases of caustic soda corroborate the testimony to the effect that, during the 1902 peach season, the Pasadena Canning Company was peeling peaches by the use of caustic soda, more commonly called lye.

Said entries also show that on May 29, 1903, the East Side Canning Company was charged with the sum of \$278.00 for a scalding, commonly known as a grasshopper. It will be recalled that two grasshoppers were bought in April, 1903, by Grier from the Berger & Carter Co. of San Francisco, and both were delivered to the Pasadena Canning Co. in order that Grier might install therein steam coils for heating the lye solution. One of these scalders was intended for the peach peeling machine then being built for the East Side Canning Company and, therefore, in May, 1903, we find one of said scalders charged up, on the books of that company, to the East Side Canning Company.

The entries show that, on July 30, 1903, the East Side Canning Co. was charged up with the peach apparatus sold to it by Grier's firm, and also charged for the work of installing the steam coils in the grasshopper. Regarding said entry of July 30, 1903, Grier said:

"Q. By means of that entry are you able in any manner to fix the time when that East Side Canning Company machine, lye-peeling machine and apparatus was set up there?

"A. *It was finished, it was all done when this entry was made here*" (R. 309).

Regarding the first use of said machine, after its completion prior to July 30, 1903, Taylor, of the East Side Co., said:

"Q. Mr. Taylor, when you first took this machine into your place, how was the water connected?

"A. You mean the pressure?

"Q. Yes.

"A. The pressure was very low; we tried it for two or three days and we could not use the water in the other part of the house, because it made it so weak.

"Q. You say you tried it two or three days, you mean in the actual operation of the machine?

"A. Yes.

"Q. Then what did you do?

"A. I bought a pump.

"Q. Was that pump installed in this machine, then?

"A. It was, yes" (R. 381).

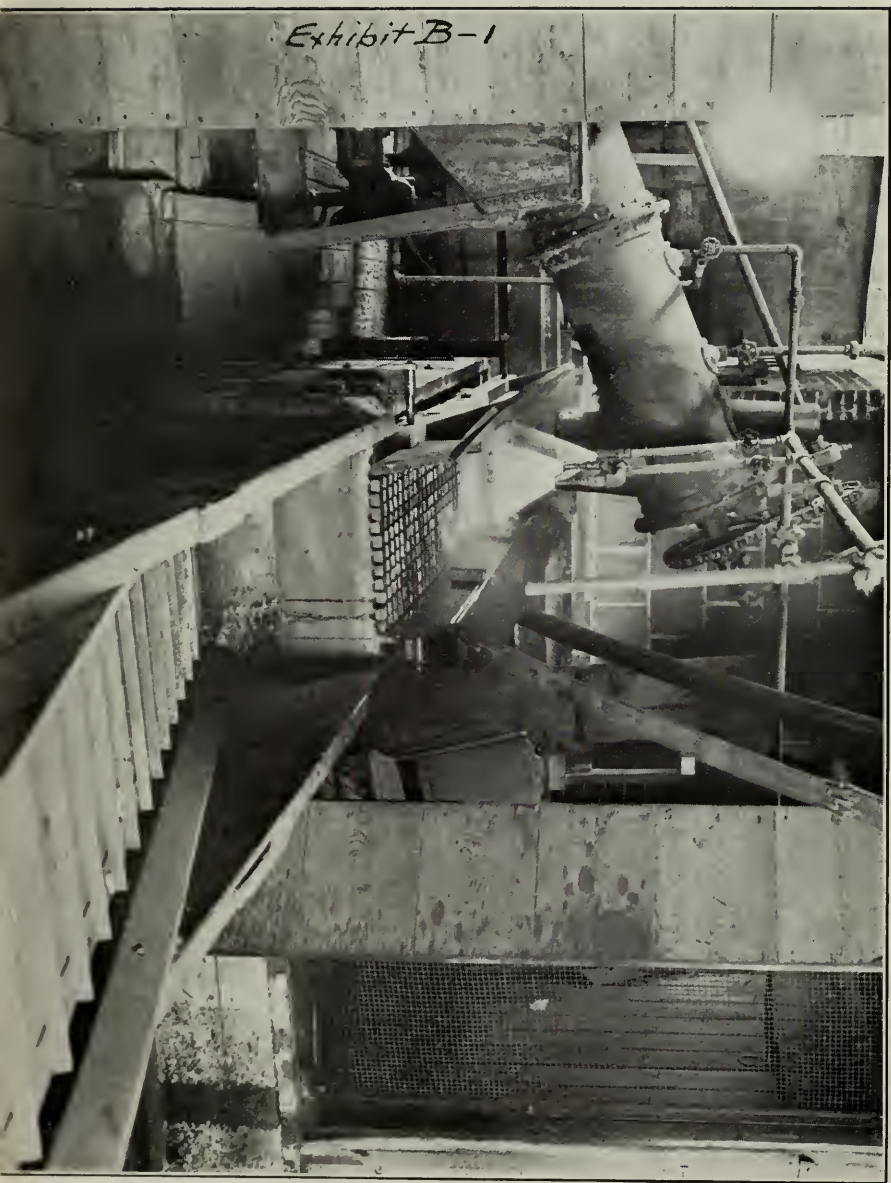
Said pump was bought from the Baker Iron Works of Los Angeles, and the *original bill* for same was offered in evidence and shows it was delivered on August 3, 1903 (R., 382). A copy of said bill appears at page 904 of the record. Said pump is shown in the photograph of the said East Side Canning Company's machine offered in evidence. On the opposite page appears a reproduction of said photograph.

The books of the Pasadena Canning Company also show the extensive purchases by it of caustic soda during the 1903 peach season.

W. H. FINLEY testified he entered the employ of the Pasadena Canning Company on April 6, 1903, and that the particular purpose, for which he was employed, was to build the line of tanks for the peach



Exhibit B-1







peeling machines. However, by reason of a delay in getting the lumber therefor, he did not commence actual work on the tanks for a week or ten days after April 6th. Later on, he was entrusted with the remainder of the work on the machines, which were completed in July, 1903 (R., 237-239).

Finley described, in detail, the two machines built by him and the operation, in 1903, of the one installed at the Pasadena Canning Company's plant.

Regarding the pump bought by the East Side Company in August, 1903, from the Baker Iron Works, Finley said:

"Q. Do you know anything about the pressure of the water at the East Side cannery in Los Angeles in 1903, when they first started that machine?

"A. Yes, it was weak.

"Q. Do you know whether anything was done in that regard?

"A. Mr. Taylor ordered a pump.

"Q. What was the purpose of such pump?

"A. For the same purpose, to make the pressure sufficient to wash the disintegrated peel from the peach.

"Q. Did you see that pump in place afterwards?

"A. Yes, I helped install it.

"Q. Is that the pump that is shown in one of these photographs?

"A. Yes, I recognized that while I was looking through it a while ago.

"Q. That is the photograph B-8s?

"A. Yes.

"Q. Did you ever afterwards build any more of these machines?

"A. Yes, I helped to build two more and a shaker" (R. 247).

The actual shaker mechanism, pipes and Gem nozzles, forming a part of the East Side Company's machine, completed in July, 1903, were identified by Finley and offered in evidence as "Defendant's Exhibit K" (R., 270).

The bookkeeper, J. R. LUSBY, also testified to the fact of Finley's employment, in 1903, to build the peach peeling machines, which he described (R., 294-5). Regarding its use, Lusby said:

"MR. CHAPPELL—Q. When did the machine go into full operation that year—when did the peach season begin in which the machine was used?

"THE COURT—Which year are you speaking of now?

"MR. CHAPPELL—Q. 1903.

"A. Just the exact date I could not give you; along in July, middle or latter part of July" (R. 299).

MRS. ALMA GRIER also described the Grier machine and stated it was used at the Pasadena Canning Company in 1903 and thereafter during every season up to 1914 (R., 367).

G. C. WATERHOUSE, manager of a school for boys, and son of ex-Mayor Waterhouse, of Pasadena, testified he worked in the Pasadena Canning Company plant during the years 1902, 1903 and 1904. He fully

described the Grier machine and stated he saw it in use during the 1903 peach season (R., 373-5).

F. F. STETSON, a Southern California canner, also described the Grier machine and said he saw it in use at the East Side Canning Company's plant during the 1903 season (R., 389).

FRANK H. SANBORN, a retired business man of Los Angeles, testified as follows:

"Q. Now for whom did you work in 1901, 1902 and 1903?

"A. Mr. Stetson.

"Q. Were you in Mr. Taylor's Cannery (East Side Canning Co.) during any of those years?

"A. Yes, a great deal.

"Q. What process of peeling peaches did Mr. Taylor use during those years?

"A. In 1901, 2 and 3, he used a lye process of peeling peaches.

"Q. Tell us what that process consisted of and how it was worked at that time?

"A. In Mr. Taylor's cannery?

"Q. Yes.

"A. They had tanks, wooden tanks—

"THE COURT—Q. That was 1901, 2 and 3, you say?

"A. Yes. The peaches were dipped into a tank and scalded and then into another tank and washed and so on until they were through several tanks.

"MR. LYON—Q. At any time was that process changed?

"A. In 1903.

"Q. What was the change made at that time?

"A. In 1903 they put in a machine and that scalded the peaches and it went from that into a

line of tanks or a line of tanks and carriers they were washed.

"Q. After leaving the scalding tank do you remember what was the first part of the machine after that?

"A. Leaving the scalding tank they went on to a washing arrangement with sprays.

"Q. Just describe that washing arrangement and the location of the sprays and how it operated at that time?

"A. Coming from the scalding it went on to a platform, a cradle arrangement.

"THE COURT—Q. Did it look anything like that thing over there?

"A. Yes, that is the style of arrangement it went on.

"THE COURT—*That is enough; there is no use piling up evidence and getting a repetition of the matter.*

"MR. LYON—That is all, Mr. Sanborn.

"MR. CHAPPELL—*No cross-examination*"  
(R. 392).

On other occasions, the lower Court also stopped defendant from putting in further proofs regarding the Grier invention. The said proofs were so overwhelming that, as the lower Court said, there was no need of further *piling up the evidence*. Opposing counsel also tacitly admitted such to be the situation and refrained from cross-examination. As heretofore stated, plaintiff's counsel, in the lower Court, did not seriously question said Grier proofs. They amount to a demonstration.

W. F. HERMAN testified he was employed by Grier's

company in 1902 and 1903 and, in May, 1903, saw Finley there working on the tanks. He described the Grier machine and stated it went into operation at the beginning of the 1903 peach season, which commenced in July (R., 354-360).

MARY E. MAYES began working for Grier's company in 1902 and thereafter worked for it a number of seasons. She refers to the 1902 use of the lye process and the removal of the disintegrated skin by hosing it off. In 1903, she saw the use of Grier's machine, which she described. On September 6, 1904, she went to the World's Fair at St. Louis (R., 385-388).

In his brief, filed in the lower Court, Mr. Chappell states:

"But it is believed that there must have been, in view of the identity of the structures, some inter-communication between Beekhuis and Grier, but as it is not material, because both are subsequent to Dunkley, it has not been attempted to go into the matter."

In 1903, H. A. Beekhuis was the superintendent of the Hanford, California, plant of the California Fruit Cannery Association. There is no pretense that he built any peach peeling machine before 1904 (R., 473). It is to be noted that his patent, issued on September 3, 1907, upon his application filed on May 25, 1904, was in interference with the Dunkley application. Possibly Mr. Chappell's suggestion, of some



intercommunication between Beekhuis and Grier, is based on some information received by him from Mr. R. I. Bentley or from some other official of the California Fruit Canners Association. It will be recalled that on May 22, 1914, the Dunkley Company gave the California Fruit Canners Association a *free* license under the patent in suit and, in reference to such circumstance, Mr. Bentley said:

“A. The only talk that I had with Mr. Dunkley was this: that if he gave us a *free* license, naturally our interest lay with him, and *we would do what we consistently could*.

“Q. Then you considered and do consider that the interests of the California Fruit Canners Association are with the Dunkley Company at the present time in this litigation?

“A. Yes” (R. 226).

The reason for the granting of said *free* license will be hereafter commented on in connection with our discussion of the Vernon machine.

However, even though Mr. Chappell's suggestion may be based on information from such source, we believe the record herein confirms the correctness of such suggestion. The introduction in evidence of the letters, about to be referred to, was objected to on the ground that the same were immaterial and the objection was sustained and excepted to. In our opinion said letters are so obviously material for many reasons that we shall refrain from arguing the question of their materiality. They speak for themselves.

On August 4, 1903, M. J. Fontana, an officer of the California Fruit Cannery Association, wrote to E. H. Kennedy, Superintendent of the Los Angeles plant of such Association, as follows:

"Aug. 4, 1903.

"My dear Mr. Kennedy:

"I intended to look how Grier & Waters are peeling their peaches but did not get the time. I therefore wish you would in some way or other find out what system they use. This ought to be attended to at once by some intelligent person and promptly reported to head office. A prompt attention to above will be appreciated.

"Yours truly,

"M. J. FONTANA" (R. 397).

This letter certainly shows that the California Fruit Cannery Association had, in some way, found out that Grier was using some new method or machine for peeling peaches and was most anxious to find out just what it was. On August 5, 1903, Kennedy replied:

"Aug. 5th, 1903.

"California Fruit Cannery Association,

"San Francisco, California.

GENERAL SUPERINTENDENT.

"Gentlemen:—

"Replying to your favor of the 4th regarding system of peeling peaches employed by Grier & Waters, the writer was at Pomona a few days ago and was through Mr. Waters Cannery and we did not notice anything new in this line; he has a crude arrangement of dipping his peaches in a solution of soda but it is the same as it was five years ago, they use it very little if any and only then on pie

fruit, in fact we do not think he has used it since Grier left there, but peels all his fruit by hand with the Pomona peeling knife.

"Grier works part of his fruit with the soda system, and *has an arrangement of putting the fruit under hydraulic pressure of water after it has been treated by the soda, or in other words he has the water under about 70 pounds pressure and directs this against the fruit to remove all effects of the soda as well as peeling dirt, etc.*, and last season they turned out some very nice goods with it; have not heard what they are accomplishing with it this season and they only commenced work on peaches two days ago *and do not know if they have used it or not this season.*

"Very truly yours,

"CALIFORNIA FRUIT CANNERS ASSOCIATION,

"Per E. H. Kennedy" (R. 399).

It will be noted Kennedy states he does not know what Grier was using at the time of writing the letter, to wit: August 5, 1903. In view of Kennedy's inability to give the desired information and in view of the importance placed on the securing of it by Fontana, *it is naturally to be presumed that the California Fruit Canners Association made further inquiries and ascertained that Grier was then using, in August, 1903, his new machine embodying said shaker device.* Having secured such information, it is, of course, most probable that the Association passed it along to Beekhuis, one of its superintendents. We believe, therefore, that Mr. Chappell is correct in his said suggestion; especially in view of the fact that he has other sources of information not open to us.

The testimony of Grier, of Mrs. Grier and of Clarence L. Kennedy, in reference to Grier's conception and disclosure, during the peach season of 1902, is consistent with all the surrounding circumstances and is consistent with the ordinary laws governing human conduct.

Grier could only carry on his experiments during a peach season and it is natural that he conceived the invention while carrying on and as a culmination of such experiments. The actual building of his peach peeling machine began in April, 1903, so he must have conceived the ideas embodied therein before that date. In view of the foregoing, it would be most remarkable if he did not conceive the invention during the 1902 peach season, commencing the latter part of July and running through August and September. Therefore, there can be no reason to doubt that said witnesses were correct in fixing Grier's date of conception and disclosure during the 1902 peach season. Kennedy's letter to the California Fruit Canners Association fully corroborates the testimony to the effect that, during the 1902 peach season, Grier was using peeling jets or spray to remove the disintegrated skin after its subjection to the lye-solution. Furthermore, said letter shows that, on August 5, 1903, and necessarily before that date, Kennedy knew of the use of peeling jets or spray, *under a seventy pound pressure*, as a means for the removal of the disintegrated skin. Hereafter, we shall show that, *at that very time*, Kennedy

was using one of the Vernon machines embodying peeling jets or spray and rotating brushes for the removal of the disintegrated skin.

There being no use for a peach peeling machine except during a peach season, it is evident that Grier, after conceiving his invention during the 1902 peach season, was most diligent in reducing to practice such invention because, as early as April, 1903, he had started to build two of said machines and had them ready for use before the next season to wit, the 1903 peach season.

We call attention to the full and complete proofs pertaining to the history of the Grier invention. Said proofs are of the nature and character of those held, in all of the decisions, as sufficient to prove an anticipation of a patent. Said proofs stand unimpeached and were not even seriously questioned in the lower Court. The same not only comprise the oral testimony of a large number of reputable witnesses in a position to know the facts; but also embrace the vital part of the actual machine relied on; photographs of the remaining parts, which are still in existence, but of too bulky a nature to offer in evidence; the original books of entry showing the transactions pertaining to the building of and use of said anticipating machines; and original documents showing the purchase of parts of said machines. Furthermore, the oral testimony shows from whom, in California, various parts of said machines were purchased, thus

affording ample opportunity to the opposing party to check up the accuracy of said testimony.

The respective dates pertaining to the respective activities of Grier and Dunkley in connection with their respective inventions are as follows:

	Grier.	Dunkley.
Conception	August-Sept. 1902	August, 1903.
Disclosure	" " "	" "
Model	—————	October, 1903.
Reduction to Practice	July, 1903	August, 1904.

It will be noted that Grier was the first to conceive and also the first to reduce to practice. Therefore, under all the authorities, he must be held to be the first inventor. Even if Dunkley be accorded August, 1902, as his date of conception, nevertheless, Grier would still be the first inventor, as Dunkley was not diligent in reducing the invention to practice, he having allowed two peach seasons to go by without making a commercial machine.

Furthermore, the burden was on plaintiff, to prove, *beyond a reasonable doubt*, that Dunkley made his invention prior to the *public use* of the Grier machine in July, 1903. Of course, the proofs show, *beyond a reasonable doubt*, that Dunkley's first consideration of the invention was in August, 1903, when he discussed the matter with Bruncker after the commencement of the Michigan 1903 peach season.

In view of the fact that Grier was the first in-



ventor and that plaintiff failed to prove Dunkley's *date of invention* was prior to the public use of the Grier machine in July, 1903, the Dunkley patent is invalid.

## VI.

### PRIOR USE OF VERNON MACHINE.

It is admitted that, during the months of July, August and September, 1902, at the Fresno, California, plant of the California Fruit Cannery Association, the so-called Vernon machine was publicly and commercially used. It is also admitted that three additional Vernon machines, each of a larger capacity than the 1902 machine, were built and installed prior to the 1903 peach season. During such 1903 peach season, said machines were commercially used by the said Association in its various plants.

It is admitted that the 1902 Vernon machine embraced the line of apparatus disclosed in the Vernon *process* patent No. 784,527 issued on March 7, 1905, upon Vernon's application filed on November 22, 1902. The patentee, C. J. Vernon, was killed on December 20, 1902, in a railroad wreck (R., 125). During the 1902 peach season, he was superintendent of the Fresno plant of the California Fruit Cannery Association. A copy of the Vernon patent appears at pages 742 to 744, inclusive, of the record herein. It is to be noted that said patent is for a "*Process* of

Peeling Fruit," the patentee, Vernon, *evidently believing there was nothing new or patentable in the several devices included in the line of apparatus used in practicing the process*. Therefore, the apparatus referred to therein as being adapted for use in carrying out the process is not fully described in the specification or plainly or accurately shown in the drawings. Said apparatus is referred to as merely "one form of apparatus capable of employment in carrying out" the process. The patent being for a *process*, Vernon's patent solicitors evidently thought it sufficient to merely indicate the type of apparatus that could be used without giving the details of construction of such apparatus. Beginning at line 40, page 1, of the patent, it is stated:

"This process or method relates to the removal of the outer covering or peel from fruit or other articles and it consists, essentially, in cutting and pitting the fruit, conveying the same within a closed heated receptacle, progressing the fruit through a solution of caustic soda in said receptacle, then discharging the fruit into a solution containing alum, then immersing the treated fruit into cold water, thence discharging the fruit upon a brushing machine, thence into cold water, from which the fruit emerges in condition for transportation to the place of deposit or otherwise."

Beginning at line 1, page 2, of the patent, it is said:

" . . . provided with an endless conveyor or belt 16, constructed to discharge the fruit upon a

brushing machine 17, where any particles of the outer covering or peel are removed from the fruit and from which the thoroughly peeled fruit is discharged, etc."

It will be noted that the so-called "*brushing machine*" is not described and the same is merely indicated in the drawings without any attempt to show the details thereof. However, it is stated that the fruit is "*thoroughly peeled*" on leaving such brushing machine.

On the opposite page, are reproduced the Vernon patent drawings, which indicate, in a general way, the several devices making up the line of apparatus which may be used in carrying out the process. The lye or caustic soda tank, shown in the drawings, is of the type known as a "grasshopper" and is so referred to in the testimony.

It is admitted that the "*brushing machine*," forming a part of the Vernon line of apparatus, as actually used in 1902, was, in fact, an adaptation of the Baker, et al. "Fruit Cleaner, Brusher and *Washer*" disclosed in United States letters patent No. 616,284 issued on December 20, 1898. A copy of said patent, Defendant's Exhibit F, appears at pages 883 to 886, inclusive, of the record herein. In his brief, filed in the lower Court, Mr. Chappell said:

"The Vernon machine made use of the Baker-Chalker orange polisher for washing. A quantity of water was delivered on to the brushes and the fruit, which was rubbed by the brushes, etc."

No. 784,527.

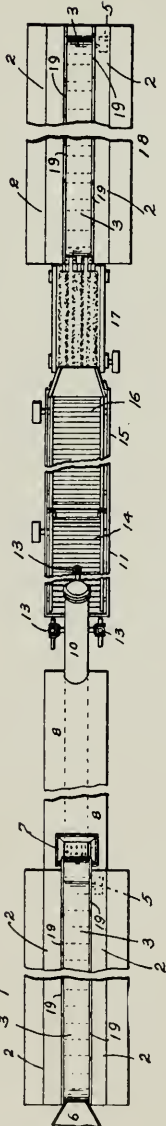
PATENTED MAR. 7, 1905

C. J. VERNON.

PROCESS OF PEELING FRUIT.

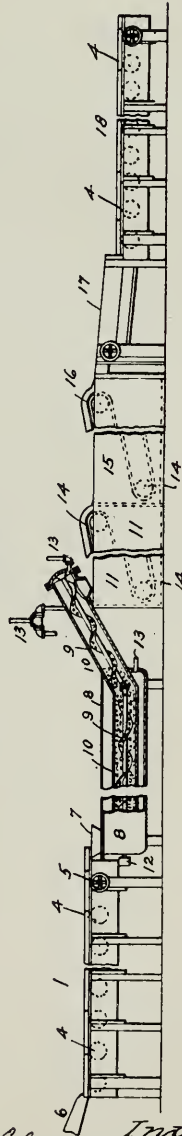
APPLICATION FILED NOV. 22, 1902.

Fig. 1



Witnesses  
My G. Cates.  
L. B. Alderete.

Fig. 2



Inventor  
Charles J. Vernon  
By  
Charles L. Rogers  
his Attorney







No. 616,284.

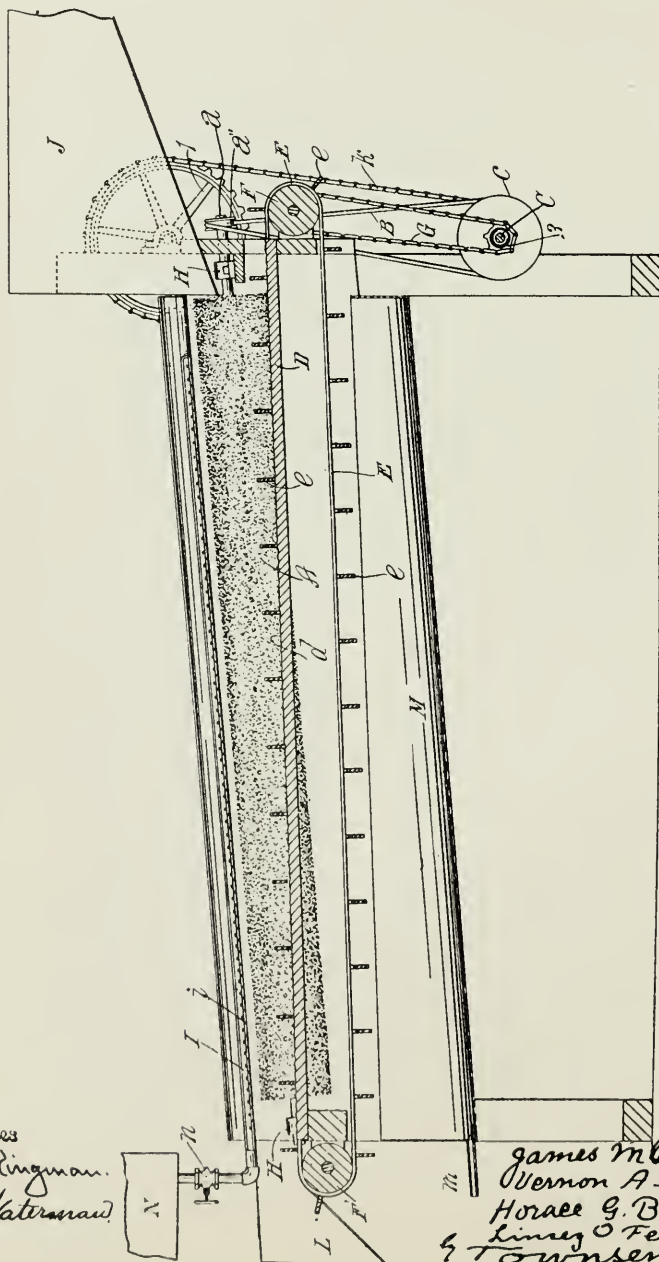
Patented Dec. 20, 1898.

J. M. BAKER, V. A. CHALKER, H. G. BAKER & L. O. FERGUSON.  
FRUIT CLEANER, BRUSHER, AND WASHER.

(Application filed Jan. 20, 1898.)

(No Model.)

2 Sheets—Sheet 1.



Witnesses  
Seymour Kingman.  
Ed. Waterman

Inventors  
James M. Baker  
Vernon A. Chalker  
Horace G. Baker  
Linus O. Ferguson  
& Townsend Bros  
attorneys

On the opposite page is reproduced sheet 1 of the Baker, et al. patent. The drawing, "Figure 1 is a longitudinal vertical mid-section" of the Baker machine. In the drawing, one rotating brush A, the endless belt or carrier E and the *perforated water-pipe* I are shown. As said drawing is a vertical mid-section view, the other rotating brush on the *near* side of the endless belt E is not shown, but it is of course to be understood that, in said machine, the fruit was carried along on the endless belt E between *two* rotating brushes and beneath the perforated water-pipe located directly above the endless belt.

Regarding the water-pipe I, it is said, beginning at line 25, page 2 of the Baker et al. patent:

"I indicates a water-pipe provided with perforations i, arranged in three rows, one row along the bottom and a row along each side of the bottom row, so as to direct the water downward on to the fruit and sidewise on to the brushes while the same are in operation for washing fruit."

For the moment leaving out of consideration the "peeling jets" or *spray* referred to in the Dunkley patent, it will be seen that the Vernon machine, as actually used more than two years prior to the Dunkley application date, *admittedly embodied each and every element of all the respective combinations of elements respectively covered by the Dunkley claims in issue*. Furthermore, it is admitted that, in the operation of said Vernon machine in 1902, water was

conveyed to the perforated pipe and issued from the perforations thereof.

In the lower Court, opposing counsel, so far as we were able to understand their argument, urged only two grounds why the Vernon machine should not be adjudged a complete anticipation of the Dunkley patent. These grounds were:

1st. That in the structure, *shown in the Baker-Chalker fruit washer patent*, the carrier-belt moves at a speed slower than the speed at which the rotary brushes move.

2nd. That the 1902 water pressure at Fresno was insufficient to cause the water to issue from the perforated pipe in the form of peeling jets or spray.

Upon said two grounds, opposing counsel based their contention that, in the operation of the Vernon machine, the brushes only did the peeling.

Before considering said contention, it is necessary to first consider what is disclosed in the Dunkley patent. Whether or not the Vernon machine anticipates depends upon its substantial identity with the machine *disclosed and as disclosed in said Dunkley patent*.

*There is not a word said in the Dunkley patent in reference to the speed at which the carrier belt should run or what its speed is relative to the speed at which the rotary brushes run, or at what speed the rotary brushes run. Anyone, attempting to practice the invention disclosed in the Dunkley patent, would neces-*

sarily be compelled to use his own judgment as to the proper speed at which to run the fruit through the machine.

Furthermore, there is not a word said in the Dunkley patent as to the amount of water pressure required in the operation of the machine. The amount of said pressure is likewise left to the judgment of the one attempting to build and operate a machine in accordance with the said patent.

The foregoing shows that opposing counsel are attempting to differentiate the Vernon machine from the Dunkley machine, as disclosed in the Dunkley patent, *in respect to details not disclosed in said patent*. However, the record conclusively shows that the Vernon machine peeled peaches by the use of peeling jets or spray and not by the action of the brushes alone.

In his opening statement, in the lower Court, Mr. Chappell said:

"The patent (Dunkley) indicates that the brush acts somewhat on the peach in abraiding the surface, but the principal work is done by the sprays, and the sprays are particularly claimed as instrumentalities in the claims involved herein, and they are the principal instrumentalities we can show, *because the machine will not peel a peach if forsooth the sprays of water are cut off*; if the machine is then run, although the peach has been soaked, it will not be peeled; the peach passes too rapidly for one thing for the brushes to act upon it; *but if it was run slowly the brush would sim-*

*ply move the peel to another place on the surface, and it would not be gotten rid of; it needs the active agency of a spray of water striking against the peach to dash the disintegrated peel from the surface of it. It is also particularly necessary that the spray act upon the peach because of the irregularities in the surface of the peach, the brush would not reach the cavity around the stem, or the irregularities on the crease of the peach, all of which are reached positively by the spray"* (R. 56).

Mr. Chappell is absolutely correct when he says that the brushes *alone*, in one of these brush peach peeling machines, will not remove the disintegrated skin. That fact must be apparent, when one considers the nature of such skin. As said by Melville Dunkley in reference to the chemical action of the caustic soda solution on the skin:

"THE COURT—Q. It reduces it to a glutinous mass or paste?

"A. Yes" (R. 82).

As said by Mr. Chappell, whether the peach goes through the machine *rapidly* or *slowly* is immaterial; in neither case, will the brush alone remove the skin; as said by him: "*but if it was run slowly the brush would simply move the peel to another place on the surface, and it would not be gotten rid of*" (R., 56).

In making said statement, Mr. Chappell was referring to *whole* peaches (R., 55). Of course, his statement applies *with all the greater force to half-*

*peaches* such as were operated on in the Vernon machine, it being obvious that the brushes could not possibly operate as efficiently on half-peaches as they could on whole peaches, and, therefore, *could not possibly exert any material peeling action or effect.* The round form and more regular contour of the whole peach makes it quite possible for the brushes to rapidly and uniformly rotate it, thus bringing every portion of the surface thereof in contact with the brushes, with the possible exception of the stem cavity. As said by Melville Dunkley, “. . . *the peach is spun in all directions*” (R., 64). Even so, Mr. Chappell says, the brushes will merely move the slimy, paste-like disintegrated skin from one place on the surface to another, without removing it. The peeling action of the brushes on *half-peaches*, by reason of their irregular shape and not being round and adapted to spin and turn around uniformly, would necessarily be even less effective than on whole peaches; in other words, it would be nil. Even if the brushes could remove the skin by contacting with the surface of the *whole* peach, there would be, in the case of *half-peaches*, no chance of much of the surface thereof coming in contact with the brushes. *It necessarily would be a hit and miss action as distinguished from the certain and uniform action of the brushes on the spinning, round whole peach.*

Regarding the operation of the Dunkley machine,



in the absence of peeling jets of water, Melville Dunkley said:

“THE COURT—Q. Without the action of the water jets the peaches would not deliver in a *merchandise* state?

“A. No.

“MR. WHITE—Q. As I understand you, that machine, without the operation of these sprays, would be a worthless proposition and could not be used commercially, is that correct?

“A. *I think that is very correct, yes*” (R. 83).

The foregoing very conclusively demonstrates that no peach peeling machine, relying on the action of brushes alone for the removal of the disintegrated skin, *could be used commercially or turn out a merchandise product*. Such a machine, for any practicable purpose, is worthless and no business man would tolerate its use for a moment in preparing peaches for market. The use of it would simply ruin the peaches run through it; as said by Melville Dunkley, from such a machine “*the peaches would not deliver in a merchandise state.*”

In regards to adapting in July, 1902, the fruit washing mechanism of the Baker-Chalker patent, for use in the Vernon machine, Mr. H. G. Baker, one of the patentees named in the Baker-Chalker et al. patent and formerly connected with the H. K. Miller Manufacturing Co., which made and sold the mechanism to the California Fruit Cannery Association, said:

"Q. Now, you say you were called up there to see if you could give this machine more capacity. Please explain what you meant by that and what, if anything, you did?

"A. The capacity simply meant that they could get more fruit through the machine in a given time; what I did to accomplish that end was two or three different things. Do you wish me to tell what those things were?

"Q. Yes.

"A. This belt conveyor could be adjusted up or down as regards axis of the brushes, *and by raising that belt conveyor it brought the fruit so high on the brushes that they did not act so much upon the fruit*, and therefore would not retard the progress of the fruit through the machine so much and more fruit would go through on that account; *by putting the brushes a little wider apart more fruit would pass through because they would act less upon it.*

"Q. Now, in that washer that was so installed—

"A. Then one other thing we did, when that machine was sent up there from the shop the brushes both rotated inwards on the conveyor, or the brushes rotated in opposite directions, both inward and downward on the conveyor, and I shifted one of the axis on the front end of the machine so that they both revolved in the same direction, *and that also turned the fruit and let it go through much faster*" (R. 106).

The foregoing changes, made at Fresno in July, 1902 (R., 110), in the fruit washer mechanism, show that it was fully appreciated the peaches could be rapidly carried through the machine. Said changes also clearly show that the brushing action of the rotary brushes was not alone relied on to remove the

disintegrated skin. Said changes were expressly made for the purpose of minimizing the brush action and limiting it practically to a mere turning of the fruit. As said by Mr. Chappell, said brushing action alone would not remove such skin *in any event* and therefore, it was impossible to rely on it to perform that function. Therefore, in making said changes, Baker so adjusted the parts of the machine that the action of the brushes was primarily merely to turn the fruit. The changes made, to increase the pressure of the water used with the machine, also clearly show that Vernon, and those working with him, fully understood that it was principally the water, and not the brushes, that removed the skin. Baker intentionally minimized the brush action and Vernon intentionally increased the water jet effect.

After referring to the changes made early in July, 1902, by Baker in the machine, R. B. Way, said:

“MR. CHAPPELL—Q. To what extent did the brushes act on the peach or peaches as they passed through the machine; were you able to see any brush mark of any kind?

“A. *Not after we raised the conveyors up*; I don't remember that we ever saw any brush marks on them” (R. 138).

It will be noted that opposing counsel ignore the changes made by Baker in the washer mechanism for the purpose of adapting it for use in the Vernon peach

peeling machine. They base their contentions on the Baker-Chalker patent alone.

That there was *plenty of water directed on to the half peaches*, while passing between the rotary brushes in the Vernon machine, is admitted by Mr. Chappell, who, in his brief filed in the lower Court, said:

“Further than that, it conclusively appears that while *there was a considerable volume of water delivered on the peaches*, the same was not delivered by any jet action, but simply dropped down *in a flood* upon the peaches and on the brushes for a general *flooding* of same, as distinguished from any *spray* action, the object being to permit the brushes to do their work and *a flood of water* to carry away any disintegrated peel or accumulations that have been displaced by the action of the brushes.”

The imaginary mode of operation, described by Mr. Chappell, is not consistent with any of the testimony; yet Mr. Chappell's said description of the Vernon machine's mode of operation was apparently adopted by the lower Court in its opinion herein (R., 697). Admittedly, said “*considerable volume of water*,” said “*flood of water*” came out of the perforations in the pipe in the Vernon machine. The only form in which it could so issue from said perforations or holes, would be in the form of *spray* or *jets*. The record herein shows and opposing counsel, Mr. Miller, at the oral argument, admitted that the natural water pressure in Fresno was 35 to 37 pounds. He said, “. . . we

"have simply to remember that the pressure there at Fresno from these artesian wells feeding and supplying water to a tank, that is, the water pressure down there at Fresno is not more than about 35 pounds —from 35 to 37 pounds . . ." (R., 686). Said pressure is, of course, the natural pressure, in the absence of the use of any pump for increasing it. The Dunkleys do not even pretend they ever used a pressure exceeding 40 pounds at any time prior to the filing of the Dunkley application, which was after the 1904 peach season. Furthermore, the Dunkley patent does not contain a single word as to the amount of pressure to be used or required and it is to be remembered that the expression "peeling jets" is not found in the Dunkley application as filed.

In regards to the pressure of the water used in connection with the Dunkley machine, Melville Dunkley said:

"A. We have used pressure of from perhaps 40 to 125 pounds.

"Q. And when you increased from 40 pounds to 125 pounds were you enabled, by reason of such change, to use a caustic soda solution of less strength?

"A. The pressure which gives you the best results in the use of all of the work of this output, that is, that allows you to use the minimum of caustic soda and the minimum of water consumption from our experience has proven to be around 70 to 75 pounds.

"THE COURT—What counsel is asking you is this: *Does the greater pressure enable you to*

*use a weaker solution in the disintegrating process?*

"A. The pressure from 40 pounds, raised to 70, will allow you to do that, and will save the use of caustic soda; I do not believe that the raise from 70 pounds up will be of much benefit" (R. 91).

Without the use of any pump in the line, the pressure of the water used in the Vernon machine was admittedly only 3 to 5 pounds less than the maximum pressure used by the Dunkleys at any time prior to the filing of the Dunkley application. *Of course, no particular pressure is mentioned in the Dunkley patent.* If it requires invention to determine what pressure should be used, the Dunkley patent is void for failure to disclose how the invention, covered thereby, can be practiced. *If it does not require invention to determine the right pressure to use,* then there was no invention on Dunkley's part in view of the prior use of water under 37 pounds pressure in the Vernon machine. Even before the installation of the pump, in connection with the water supply for the Vernon machine, about the first of August, 1902, there could have been little difference in the effect produced by Vernon's jets of water under 35 to 37 pounds pressure and Dunkley's jets under 40 pounds pressure. In each case, the jets of water played on the peaches, and, therefore, must have produced substantially the same results. *Furthermore, the peeling effect of the jets depends upon two factors, to wit: strength of lye solution and pressure of water.* In the Dunkley patent



no specific data is given in regards to either of said factors. Said matters are left to one's judgment.

Regarding the installation of the pump to increase the water pressure, defendant's witness, Way, said:

"XQ. When was the pump put into the line that you referred to?

"A. My opinion now is that it was put in about the first of August, or directly after—just about the time the bulk of the peaches began to come in.

"XQ. Was the pump taken out at the time you left there?

"A. No, not to my knowledge, it was not; I don't know.

\* \* \*

"XQ. *Are you sure that the pump was put into the line that led to the spray pipe?*

"A. Yes.

"XQ. What makes you so sure of that?

"A. Because that was our main trouble with the water.

"XQ. That is, you could not get enough water?

"A. We could not get enough water, yes" (R., 141).

The foregoing certainly shows that the operators of the Vernon machine in 1902 were relying on the pressure of the jets to peel the peaches. Otherwise, why was the brush action reduced to a minimum and the jet action increased by the installation of a pump? Furthermore, when the pressure was increased by the installation of the pump, it is quite obvious that the jets necessarily peeled or removed the disintegrated skin. The jets admittedly played on the peaches and,

under such a pressure, could not do otherwise than remove the disintegrated skin. *Jets, under the same pressure, behave the same in California as in Michigan.* The Court of Appeals for the District of Columbia recognized said fact in comparing the Dunkley and Beekhuis machines. It said:

"The skin of the peach having been disintegrated by the action of the hot solution of lye, that is to say, cut or broken and loosened from the pulp, was, to say the least, *as easily removed by one jet as another.*"

Plaintiff's own witness, Fontana, says that when he went to the Fresno plant in 1904, he found the said pump.

"Q. Did you find any pump there when you went there?

"A. Yes.

"THE COURT—Q. *Attached to the line?*

"A. Attached to the line, yes" (R., 473).

We have heretofore referred to the fact that the California Fruit Cannery Association was granted a *free* license by the Dunkley Company on May 22, 1914. A copy of said license appears at page 223 of the record. Mr. Robert I. Bentley, General Manager of said Association, was called at a witness by defendant to develop the facts pertaining to said *free* license and the consideration therefor. Mr. Bentley said:

"Q. In consideration of this license which you

have just produced, did the California Fruit Canners Association agree to refrain from giving information in regard to the prior use of such machine and processing by the California Fruit Canners Association in 1902 and 1903?

"A. No.

"Q. Was there no talk about that?

"A. We did not agree to do anything other than embodies in the agreement.

"Q. Was there any understanding, gentlemen's agreement or talk about that in any manner?

"A. The only talk that I had with Mr. Dunkley was this: that if he gave us a free license, naturally *our interests lay with him and we would do what we consistently could.*

"Q. Then you considered and do consider that the interests of the California Fruit Canners Association are with the Dunkley Company at the present time in this litigation?

"A. Yes." (R., 226.) \* \* \*

"MR. LYON—Q. Your Association, the California Fruit Canners Association, in January of this year, received a request from Mr. E. H. Kennedy of Los Angeles and Lankershim, for leave to inspect your Los Angeles plant in regard to certain measurements of machines and so forth, did it not?

"MR. MILLER—We object to that as immaterial and incompetent, something occurring after the commencement of this suit, in fact only a very few months ago, last January.

"THE COURT—What is the purpose of this?

"MR. LYON—I want to show in connection with the statements of the witness that they have considered their interests were with the plaintiff in this case, they have refused all information in this connection and have refused access to their records and that they wrote letters to us to that effect, that

they could give us no information or assistance whatever, and they would give none.

"THE COURT—I do not see the materiality of that; he is not a party.

"MR. LYON—It is to excuse absolutely the non-production of the officers of the California Fruit Canners Association, and to show that inasmuch as their interest is with that of the plaintiff in this case, if the plaintiff wants the evidence of these parties in this case, it is their duty to produce them.

"THE COURT—How is that?

"MR. LYON—Simply to explain the reasons why we do not call the officers of the California Fruit Canners Association in regard to this Vernon use, showing that they are hostile to us.

"THE COURT—*That does not excuse anything*; you cannot assume because one's interest was a certain way that he is going to come here and falsify; that is no presumption that follows, whatsoever; it is a consideration that the Court may take into its mind in determining whether a witness is stating the truth, that his interests are a certain way, but you cannot presume a man is going to tell a falsehood because it is against his interest. I have an idea what you want to get at, but you are not taking the proper way. Of course, I cannot advise you" (R. 227).

The lower Court's view, in respect to the foregoing situation, is quite different from that taken by the United States Supreme Court in respect to a similar situation arising in a patent suit in which the patent was held invalid by reason of one, other than the patentee, being the first inventor. In that suit, *Coffin v. Ogden*, 85 U. S., 120, the bill was dismissed

by the lower Court, the complainant appealed and the Supreme Court, in affirming the lower Court's decision, said:

"The appellants called no witnesses at Pittsburg or elsewhere to contradict or impeach those for the appellees. Brossi was subjected to a vigorous cross-examination, but, in our judgment, it in nowise diminishes the effect of his testimony in chief. The counsel for the appellants asked with emphasis, in the argument here, why the defendants had not called Jones, of the firm of Jones, Wallingford & Co.? The question was well retorted, why was he not called by the other side? He does not appear in a favorable light. He prevented Erbe, who was in his employ, from going to New York to testify in behalf of the defendants, and avowed a determination to prevent, if it were possible, their obtaining the testimony of Brossi, Masta and Patterson. It is difficult not to regard him with a feeling akin to that which attends the presumptions *in odium spoliatoris*. We entertain no doubt that the testimony of all these witnesses is true in every particular, including the statement of Brossi as to putting the lock on the door. *If that were false, doubtless Jones would have been called to gainsay it. His hostility to the defendants is a sufficient reason for their not calling him for any purpose.*"

As stated before, Mr. Bentley was called by the defendant for the sole purpose of explaining the extraordinary situation embracing the granting of an absolutely *free* license by the plaintiff herein to the California Fruit Cannery Association in consideration of that Association doing "*what it consistently could.*"

Defendant's counsel did not question Mr. Bentley regarding the construction and use of the Vernon machine because he was a hostile witness. However, plaintiff's counsel did not call him as a witness, and, when he was on the witness stand as defendant's witness, they carefully refrained from questioning him regarding such Vernon machine. Why? If the testimony of defendant's numerous witnesses regarding the Vernon machine were false, why did plaintiff's counsel refrain from having Mr. Robert I. Bentley deny the truth of said testimony? Mr. Bentley is a very prominent citizen in this community. He is widely known, bears an enviable reputation and his testimony, in any matter, would necessarily have great weight with any Court. He, of all others, would have proved the most valuable witness for plaintiff, that is: provided the testimony of defendant's witnesses had been false. However, it was not false, and, therefore, Mr. Bentley was not available to plaintiff as a witness regarding the Vernon machine. Evidently, he could not be handled like Schau was; evidently he was of a type different from the two Dunkleys; therefore, plaintiff did not call him as a witness.

In order to show that, prior to granting a *free* license to the California Fruit Cannery Association, plaintiff had gained knowledge of the public use of the anticipating Vernon machine in 1902, and that the granting of said free license was for the purpose of suppressing, as far as possible, proof of such antici-



pating use in any suit brought for the infringement of the Dunkley patent, defendant's counsel asked Mr. Bentley if, on February 7, 1913, before Calvin T. Milans, a Notary Public for the District of Columbia, he made the affidavit read to him as a part of the question and appearing on pages 217 to 221, inclusive, of the record herein. The objection to the question was sustained and the Court's ruling on said objection is assigned as error. We submit that the making of said affidavit and plaintiff's knowledge of the same, before the grant of said *free* license, were both facts relevant and material to the issues herein raised by the defense that plaintiff does not come into Court with clean hands. The materiality of said affidavit in respect to its acquainting plaintiff with the prior use of the anticipating Vernon machine and thus prompting plaintiff to grant such *free* license for the purpose above specified, is shown on the face of the affidavit. In it Mr. Bentley says:

ROBERT I. BENTLEY, being first duly sworn, states as follows:

"That he is forty-eight years of age; a resident of San Francisco, State of California; that since the year 1899 he has been the General Manager of the California Fruit Cannery Association;  
\* \* \* that during his experience as Manager of the said corporation he has been brought in contact with the various methods and machines employed by the corporation in its different plants in the State of California, and is familiar with

various machines used at different times for removing the peel from peaches; that during the fruit season of 1902, namely during the months of July, August and September in said year, there was installed and publicly used and operated at the factory of the California Fruit Cannery Association, the corporation above named, at Fresno, California, a machine which deponent verily believes was made by a party named Miller at Glendora, California, and which was built for the purpose of removing the peel from peaches after the peach had been subjected to or placed in an alkali bath; that the machine was purchased by the said corporation for the purpose of removing the skins from peaches and was a machine wherein two long rotary brushes were employed arranged parallel with each other and separated so as to leave a space there between and rotated by suitable mechanism; that between the brushes and slightly below the same, was an endless carrier which was connected up to the driving mechanism of the machine and was supported below its upper course by a platform or support. This carrier extended the length of the machine and was used to receive the peaches fed into the machine and to carry them forward between the brushes; that in addition to the two rotating brushes and the endless carrier there was a water pipe arranged slightly above the brushes, but directly in line with the carrier, so that the pipe lay in a plane between the two brushes and slightly above the brushes. This pipe had three rows of perforations extending throughout its length and was coupled up with the water mains of the City of Fresno. The machine was provided with a conveyor for conveying the peaches from an alkaline bath on to the endless carrier and thence by means of the endless conveyor carried forward be-

tween the brushes. As the peaches progressed through the machine and between the brushes, they were directly subjected to the jets of water issuing from the perforations in the pipe under water-main pressure and were also turned and moved by the brushes, the brushes and the *water-jets* together serving to remove the skin which had been previously treated to the alkaline bath.

\* \* \*

"The said so-called Baker et al. machine which was used for removing the peel from the peaches, in the aforesaid corporation's factory at Fresno, California, was used publicly and openly and handled the entire tonnage of peaches as received at the said Fresno factory of the said corporation during the said months of July, August and September, 1902; and that the said pack amounted to about one hundred thousand cases of twenty-four cans each, each can containing, as deponent now verily believes, five peaches to the can. \* \* \*"

Mr. Bentley's attitude towards the plaintiff was necessarily most friendly. He stated he considered the interests of his own company, the California Fruit Cannery Association, to be identical with the interests of the Dunkley Company in this litigation (R. 226). Of course, said interests were identical. Think of the advantage the California Fruit Cannery Association would have, in operating under a *free* license, over all its competitors compelled to pay a royalty for the privilege of using an invention covered by the Dunkley patent. *In view of the foregoing, why did plaintiff's counsel refrain from questioning Mr. Bentley regarding the Vernon machine?* Regarding

such a situation, the following remarks of Judge Brown in the case of *American Bell Tel. Co. v. National Tel. Mfg. Co.*, 109 Fed., 1018, are most pertinent:

“As counsel says, there are occasions in the world when the paucity of proof in the affirmative is positive proof in the negative. Considering the great importance of establishing by other witnesses experimental results inconsistent with Berliner’s express denial in his application, and the entire lack of any explanation of the absence of several witnesses who could testify upon this issue, the presumption is justified that the testimony of these witnesses would be unfavorable to the complainant. *If a party has it peculiarly within his power to produce witnesses, whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable.* *Graves v. U. S.*, 150 U. S., 118; *Runkle v. Burnham*, 153 U. S., 216-225; *Clifton v. U. S.*, 4 How., 242.”

Plaintiff called only *one* witness to testify regarding the Vernon machine as used in 1902 and 1903 *and opposing counsel was most careful not to ask him any questions regarding the construction or mode of operation of said machine.* However, the witness made a most lamentable blunder, misunderstood one of counsel’s questions and thereby upset counsel’s carefully laid plan to keep the witness away from any discussion of the details of construction or mode of operation of said machine. The said witness, T. B. Dawson, is the Assistant General Superin-

tendent of the California Fruit Cannery Association. He testified as follows:

"Q. Were you familiar with the machinery used at the plant of the company at Fresno in the year 1902 and 3?

"A. Yes.

"Q. By what name was the process known that was used there?

"A. For peeling purposes?

"A. It was the Vernon machine.

"THE COURT—Q. In what year?

"MR. CHAPPELL—1902 and 1903.

"Q. Who installed the machine there, if you know?

"A. At Fresno, Mr. Vernon, in 1902.

"Q. Do you remember his first name?

"A. No, I do not.

"Q. Was it Charles J. Vernon?

"A. Possibly.

"Q. What became of the machine there installed?

"A. We used it I think two years; I don't know what became of it eventually.

"Q. Were similar machines installed at other places in the plants of the California Fruit Cannery Association?

"A. To the best of my recollection there were two or three machines installed in 1903; two positively; I cannot say positively about the third machine.

"THE COURT—Q. In your canneries?

"A. Yes.

"MR. CHAPPELL—Q. What became of those machines, if you know?

"A. Well, eventually they were done away with, I don't know what became of them.



"Q. What method or process followed the use of these machines?

"A. It was the use of caustic soda and we had machines with brushes for brushing the peeling off after it passed through the caustic soda; the brushes had *sprays of water playing on them*.

"Q. I guess I did not make myself clear; what machines succeeded these machines in the plants of the California Fruit Cannery Association?

"A. What we called the Beekhuis machine" (R. 633).

Neither before nor after the witness made the unfortunate blunder of telling about the *sprays* in the Vernon machine, notwithstanding he was not asked about said machine, did opposing counsel ask him any questions concerning the construction or mode of operation of said machine.

Notwithstanding the fact that plaintiff only called one witness, Mr. Dawson, who had any knowledge of the Vernon machine as used in 1902 and 1903 and notwithstanding the fact that he, plaintiff's own witness, corroborated defendant's witnesses in respect to the *sprays* of water being present and used in the Vernon machine, opposing counsel had the hardihood to address the lower Court as follows:

"The use by the California Fruit Cannery Association is shown to be that of a brush machine. They never had water pressure at Fresno that would supply water for a *spray*; it was a brushing-machine, and we showed by the testimony of Mr. Dawson this morning that not only was that machine which was a Vernon machine, but also the



machine at Los Angeles and also at Hanford was superseded by the machine of Beekhuis which went into interference with Dunkley, the Beekhuis patent being offered in evidence by the defense, so that so far as that is concerned we are entitled to the date of the conception of Mr. Samuel J. Dunkley for his invention in August, 1902, *it antedates any of those devices so far as they are shown to have any spray and none of them were shown to be effective until long afterwards*" (R. 653).

The witness, H. G. BAKER, who saw the Vernon machine in operation in July, 1903, said:

"Q. Describe the action of the water and of the brushes on the fruit, as you observed it at that time?

"A. The brushes themselves turned the fruit over as they touched it, and the water washed the skin off; there was not much left but this disintegrated soft pulp, like a pulp almost.

"Q. Can you describe to us the spray or jets of water as you observed them on that machine at that time?

"A. I have described the direction of these jets; these jets hit the fruit, and one of them hit directly on the fruit; the others possibly but the edge of the fruit as it went down and sure hit the brushes" (R. 108).

R. B. WAY, on the same point, testified:

"Q. Did you say this pipe was perforated? Please explain how or in what manner it was perforated?

"A. When we first set up the machine, that pipe consisted of a tin or galvanized iron, I am not positive which, and it was perforated on the

under side, and that made the *spray of water* which washed the peeling from the peach as the peach passed through between the brushes" (R. 127).

NEWTON LUSHBAUGH testified as follows regarding the Vernon machine as used in 1902:

"MR. CHAPPELL—Q. What was the relative work of the brushes and of the sprays—how did they work together on the Vernon machine, as you saw it worked during the season of 1902?

"A. What do you mean?

"THE COURT—Q. He means what was the function that the brushes performed and what did the water accomplish?

"A. I think they both worked together in removing the peeling, that is the best answer I can make.

"Q. Can't you tell more definitely the effect of each instrumentality?

"A. Well, the peaches were fed in, that is, on the upper portion of the belt running between the brushes, and as they passed on down by gravity to the lower end of the brushes, with the water *spraying* on them, it removed the skin."

Other witnesses, called by defendant, testified to the said general effect, but, in view of the testimony of Dawson, the only witness called by plaintiff as to the 1902 and 1903 operation of the Vernon machine, we can see no necessity of referring to such other testimony. *Plaintiff's said witness Dawson refutes the contentions of plaintiff's counsel regarding the absence of the spray action in the Vernon machine.* His testimony shows that the water did issue from

the perforated pipe in the form of *spray* and plaintiff did not call Bentley to contradict either its said witness Dawson or any of defendant's witnesses on that point. However, the lower Court apparently ignored or overlooked, not only all the testimony of defendant's numerous witnesses but also the testimony of plaintiff's witness Dawson and adopted opposing counsel's views on the matter.

In its opinion herein, the lower Court stated:

"It is claimed that the evidence here is in some respects substantially different from that which was presented to that Court, but I am unable to find that there is any such essential difference as to warrant this Court in holding other than in accord with the conclusion reached by the District of Columbia Court."

We have heretofore shown that the only real issue presented to the Court of Appeals for the District of Columbia was whether or not Dunkley was entitled to amend his application by inserting therein the claims he had previously seen in the Beekhuis patent and calling for "peeling jets." The remarkable feature of the lower Court's opinion is that, although on its face professing to follow the decision of the said Court of Appeals, it, in reality, is inconsistent with said decision in respect to the only point decided thereby, to wit: the mode of operation of the Dunkley machine. We have shown that the said Court of Appeals was not called on to decide the truth or fals-

ity of Dunkley's history of his invention and that the record, in the Dunkley-Beekhuis interference, differed from the record herein in respect to the most vital fact in the history of the Dunkley invention, to wit: the date of building of the model machine. Yet, the lower Court finds there is no "*such essential difference*" between said records as to warrant it "in holding other than in accord with the conclusion reached by the District of Columbia Court."

Regarding the Dunkley machine, the lower Court said:

"The plaintiff's device operates upon quite a different principle. It has the rotating brushes but has these peeling jets of water, which are themselves the efficient means of washing off the disintegrated skin of the peach after it has been put through the lye process, and the *brushes serve the subsidiary purpose of agitating the fruit and of turning it for the purpose of presenting its different surfaces to the jets of water to enable them to do the efficient work of cleansing the skin after its disintegration by the lye-bath; . . .*" (R. 698).

The foregoing findings are inconsistent with the plain language of the Dunkley patent and with the decision of the Court of Appeals allowing Dunkley to insert in his application, claims calling for peeling jets.

When one stops to consider the nature of Dunkley's application as filed on November 29, 1904, and

as prosecuted by him up to the time he saw the Beekhuis patent containing claims calling for peeling jets; when one stops to consider that up to said time, Dunkley was emphasizing the *peeling* action of the brushes in his machine without the remotest suggestion that the water spray alone could remove the disintegrated skin; when one stops to consider that various tribunals of the Patent Office decided he was not even entitled to insert claims calling for peeling jets because of the lack, in his application, of a disclosure of any such mode of operation; and finally, when one stops to consider that the Court of Appeals of the District of Columbia only allowed Dunkley to insert the "peeling jet" claims because he had mentioned water spray as striking the peach, and, in its opinion, said "spray" would necessarily assist the brushes in removing the disintegrated skin, it is certainly most astonishing to find opposing counsel now contending and the lower Court finding that the Dunkley machine is one in which jets or sprays do the peeling and the brushes merely turn and advance the peaches! In other words, the Dunkley machine went into the Patent Office with all the emphasis on the brushes as the principal peeling means and came out of that office as one with all the emphasis on the water-spray as the principal peeling means; the said change having been brought about by reason of Dunkley seeing the Beekhuis patent!

However, the decision of the Court of Appeals

for the District of Columbia prevents the Dunkley patent from being properly given any such construction. That Court stated:

"It is to be observed that none of the counts define the water jets as constituting the sole peeling means. The counts of the issue are satisfied by a construction in which peeling water jets enter into the operation of removing the skins whether they be exclusively employed to remove the skins or not. And in neither machine as described and constructed are the water jets shown to be the exclusive means of peeling."

If the counts "are satisfied by a construction in which peeling water-jets enter into the operation of removing the skins, whether they be so exclusively used or not, then the said counts are anticipated by a structure in which peeling water jets enter into the operation of removing the skin, whether they be so exclusively used therein or not. We have heretofore shown that the words "peeling jets" are not found in the Dunkley application as filed, the term water spray having been held an equivalent expression. The testimony of witnesses, called by both parties, show the action of the water spray in the Vernon machine. Said spray or jets necessarily assisted or "entered into" the peeling operation and, therefore, said Vernon machine is an anticipation of the Dunkley peeling jet claims, according to the construction thereof by said Court of Appeals. As said by that Court, in reference to the Dunkley machine: "This comprises in



“the combination the jets of water which he evidently realized aided in the removal of the skins when dis-integrated by the alkali solution. That he did not realize the full extent of their agency cannot deprive him of the benefits accruing from their use.”

Can it be seriously contended that Vernon, and the others familiar with the operation of the Vernon machine in 1902, did not realize that the water spray or jets aided in the removal of the skins? Can it be seriously contended that, in the operation of said machine, in 1902, said water spray or jets, striking the peaches, did not aid in the removal of the disintegrated skin? If said spray or jets did so aid in the removal of the skins, and the uncontradicted testimony of the witnesses shows it did, then the Vernon machine must be held a complete anticipation of the Dunkley patent.

We have heretofore referred to the fact that, in the Dunkley machine there was actually more *brushing* surface provided than in the Vernon machine, thus showing that the peeling action of the *brushes* was more relied on in the Dunkley than in the Vernon machine. The endless belt or carrier, in the Dunkley machine, is made up of brushes and Dunkley expressly states said carrier not only conveys the peaches but *brushes* them. The corresponding carrier in the Vernon machine did not have a surface made up of *brushes*, as said carrier served only to convey the peaches.

The significance of said Court of Appeals decision is to be found in its statement:

“But let it be conceded that Dunkley was not fully aware of the effective action of the jets of water and relied chiefly upon the action of the brushes to remove the skins; . . . .”

In other words, in the opinion of the Court, it was immaterial whether or not the brushes, in the Dunkley machine, were the principal means for removing the skin, *provided the water spray or jets aided in such operation*. If said spray aided in the peeling operation, then, in that Court's opinion, Dunkley was entitled to claims covering such spray or jets as peeling spray or jets. Therefore, it is immaterial whether or not, in the Vernon machine, the brushes were chiefly relied on to remove the skin, provided the water spray or jets therein *aided* in the removal of the skin. If the said spray or jets so *aided* in the removal of the skin, then the Vernon machine, equally with the Dunkley machine, must be held to embody “peeling jets” and, therefore, must be held to be a complete anticipation of the Dunkley patent.

Plaintiff's only witness, beside Dawson, who testified regarding the Vernon machine, was Mark E. Fontana. Fontana took charge of the Fresno plant of the Association in 1904. In the spring of 1902, before the Vernon machine was built, and in the summer of 1903, before the machine was in operation, he visited the plant (R. 474). Therefore, he did not

see said Vernon machine in operation at the Fresno plant, either in 1902 or in 1903. Plaintiff's witness Dawson said that said machine was used two years.

"A. We used it I think two years; I don't know what became of it eventually" (R., 633).

In 1904, Fontana increased the pressure of the water running to the spray pipes by substituting a larger pipe from the main water line and putting in a new pump in the place of the one he found there (R. 472). He says he also put some spray pipes over the conveyors in the water tanks and over some of the chutes in the line of apparatus (R. 472). Whether the Vernon machine was used in 1904, or whether the Beekhuis machine was substituted in its place that year, does not appear from Fontana's testimony. However, according to Dawson, the Vernon machine was used only in 1902 and 1903. Therefore, what Fontana did in 1904, in reference to putting in spray pipes, must have been in connection with the Beekhuis machine. As Dawson said:

"Q. I guess I did not make myself clear; what machines succeeded these machines in the plants of the California Fruit Cannery Association?"

"A. What were called the Beekhuis machine" (R. 634).

The substance of Fontana's testimony is, therefore, that the water pressure was increased at Fresno in 1904, in connection with the sprays used in the Beek-

hais machine; the shaker device of said machine having been substituted for the brush mechanism of the Vernon machine.

Regarding the wide range of pressures that could be successfully used in the operation of the Dunkley machine, Melville Dunkley said:

"A. We have used pressures of from perhaps 40 to 125 pounds.

"Q. And when you increased from 40 pounds to 125 pounds were you enabled, by reason of such change, to use a caustic soda solution of less strength?

"A. The pressure which gives you the best results in the use of all of the work of the output, that is, that allows you to use the minimum of caustic soda and the minimum of water consumption from our experience has proven to be around 70 to 75 pounds.

"THE COURT—What counsel is asking you is this: *Does the greater pressure enable you to use a weaker solution in the disintegrating process?*

"A. The pressure from 40 pounds raised to 70, will allow you to do that, and will save the use of caustic soda; I do not believe that the raise from 70 pounds up will be of much benefit" (R. 91).

In view of the foregoing, it is obvious that Fontana's act of increasing the water pressure at Fresno in 1904 has no bearing on the question whether or not the Vernon machine, as used in 1902 and 1903, employed jets or *sprays* to aid in the peeling operation.

The Dunkleys do not pretend to have used a pres-

sure in excess of about 40 pounds at any time prior to the filing of the Dunkley application in November, 1904, or in other words, at any time prior to the 1905 peach season. In the lower Court, Mr. Chappell said that "*in the law of patents the last step wins.*" That is true in one sense but it is not true in the sense that Dunkley was *the last* to take every step in the development of the peach peeling machine.

The record shows that Grier was the first to perceive the advantages of using water under pressure of 70 pounds or more. He was using such a pressure as early as the 1902 peach season and continued the use thereof during the subsequent peach seasons. It will be recalled that E. H. Kennedy, in 1903 Superintendent of the Los Angeles plant of the California Fruit Cannery Association, wrote, on August 5, 1903, to said Association, at San Francisco, regarding the manner in which Grier was peeling his peaches. In his said letter, Kennedy said:

"Grier works part of his fruit with the soda system and has an arrangement of putting the fruit under hydraulic pressure of water after it has been treated by the soda, or in other words he has the water under about *70 pounds pressure* and directs this against the fruit to remove all effects of the soda as well as peeling dirt, etc., and last season they turned out some very nice goods with it; have not heard what they are accomplishing with it this season and they only commenced work on peaches two days ago and do not know if they have used it or not this season."

At the very time Kennedy wrote said letter, *showing his complete knowledge and understanding of the use of peeling jets of water to remove the disintegrated skin*, there was being used, under his superintendency, at the Los Angeles plant of the California Fruit Cannery Association, one of the Vernon machines, having a capacity larger than the 1902 Fresno machine (R. 394). Regarding the said skin-removing means used in said Vernon machine, Kennedy said:

"The fruit was discharged from this draper on the elevator and elevated up about 4 feet high and at the top there we had a device for separating the peaches into three different runways, and the fruit fell on to three different belts, each belt running parallel between the brushes; right over these brushes were water-pipes for *spraying* the fruit and brushes . . ." (R., 395).

It appears, therefore, that Kennedy, in August, 1903, fully understood the nature of the peeling action then being performed by the *sprays* in such Vernon machine. By means of said Kennedy letter of August 5, 1903, the California Fruit Cannery Association headquarters at San Francisco, as early as August 6, 1903, had knowledge of the use of water jets under a 70-pound pressure and, no doubt, it was such knowledge that prompted that Association, through Fontana, to still further increase the water pressure at Fresno for the 1904 season by the substitution of a larger pipe line and of a pump larger than the one installed in



August, 1902, for the purpose of increasing the pressure at that time.

As Melville Dunkley said, an increase in the water pressure enables one to use a weaker solution of caustic soda. The water pressure at Los Angeles was evidently such as to require a strong solution of caustic soda. For that reason, a neutralizing agent was used there in connection with the use of the Vernon machine and only second grade peaches were operated on (R. 400-1). However, that fact had nothing to do with the peeling operation of the Vernon machine. Kennedy, at that time, was perfectly familiar with the use of water jets under a pressure of 70 pounds to remove the peel. His letter of August 5, 1903, conclusively proves that. However, if he did not have such a pressure, he was compelled to do just what Melville Dunkley said had to be done in such a case, to wit: use a stronger caustic soda solution, which necessitated the use of a neutralizing agent. With the use of such a stronger solution, the jets, under a much less pressure, would of course remove the disintegrated skin.

The record shows that practically the entire 1902 output of the Fresno cannery was handled on the Vernon machine. The exact amount of said output does not appear in the testimony herein, although it can be obtained by reference to the affidavit of Mr. Bentley, who places it at about 100,000 cases of 24 cans each.

It must be constantly borne in mind that the use of a peach peeling machine involves a consideration of many factors not dependent upon the mechanical construction of the machine. The proper strength of the lye solution varies according to the variety and condition of the fruit, as does the proper time of submersion therein vary in accordance with such other factors. The handling of the peeled fruit also presents the problem of preventing it from discoloring. All these factors had to be determined in the early days in connection with the peeling of half peaches, but none of them pertained to the construction of the machines or to their mechanical operation. The Dunkley patent is silent as to all said matters.

The Vernon machine was commercially used throughout the 1902 peach season. The product turned out by it, necessarily must have been a merchantable article. Such an institution as the California Fruit Cannery Association, would not use a machine throughout an entire season if the product being turned out by it was not merchantable. The practical and commercial success of said 1902 use of said machine is demonstrated by the fact that the California Fruit Cannery Association made three more of said machines for use during the 1903 season. Said fact is much more persuasive as to the commercial efficiency of the Vernon machine than any speculations of opposing counsel to the contrary.

As before pointed out and as so forcibly and em-

phatically stated by Mr. Chappell and Melville Dunkley, the commercial efficiency of such a brush machine necessarily depends upon the peeling action of the *spray*. As stated by Mr. Chappel, even if the peach was *slowly conveyed* through such a machine "*the brush would simply move the peel to another place on the surface and it would not be gotten rid of; it needs the active agency of a spray of water striking against the peach to dash the disintegrated peel from the surface*" (R. 56).

Therefore, the only possible explanation of the commercial success of the Vernon machine in 1902 and the only explanation of the California Fruit Canners Association building three more of said machines in 1903, is that, in the operation of said Vernon machine the spray or jets of water entered into and aided the peeling operation.

In view of the public use of said Vernon machine for more than two years prior to the Dunkley application, it is not difficult to surmise the *quid pro quo* the Dunkley Company expected to receive by granting a *free* license to the California Fruit Canners Association.

As stated before, Vernon made no effort to patent the mechanical features of his machine. He undoubtedly thought there was nothing patentable in his line of apparatus because the same comprised a number of old devices hooked up together and adapted for use as a peach peeling device. Grier also took the same

view of his own machine and he made no attempt to patent it.

Opposing counsel attempt to make much capital out of the fact that the Vernon machine gave way to an improved and superior machine of the Grier and Beekhuis type. Of course, they ignore the fact, that incidentally said Grier type of machine also prevented the Dunkley brush machine from going into any general use. Not ten Dunkley machines have ever been built, even though the Dunkley Company has had since 1903 in which to exploit such type of machine. However, merely because a machine gives way to subsequent and superior machines, does not mean the first machine was not a commercially practical machine. The Dunkley patent is not void, merely because no one to-day could think of using the Dunkley brush machine in preference to an up-to-date machine. A perfect machine is a *rara avis* and nothing is simultaneously invented and perfected.

The Vernon machine was the pioneer machine for removing the disintegrated skin from fruit. It embodies means for supporting and advancing the fruit and subjecting the same to the action of peeling jets or spray. *What details of construction and what data are disclosed in the Dunkley patent that would enable one to build a machine more efficient than the Vernon machine?* The Dunkley patent points out no particular water pressure, no particular sized jets or perforations or number of perforations, no par-

ticular strength of caustic soda solution, no particular speeds and no particular dimensions, but leaves all those matters and details to the judgment of the one attempting to build a machine in accordance with the disclosure thereof. Therefore, what could one, familiar with the Vernon machine, learn by studying the Dunkley patent? Nothing. *Subtract the Vernon machine from the Dunkley disclosure and nothing is left of a patentable nature.* The fact the Vernon patent was cited during the prosecution of the Dunkley application is of no significance. We have already pointed out that the Vernon patent does not describe or clearly show the brush mechanism or any spray pipes used therewith. Therefore, the Patent Office, in considering the Vernon patent, was not considering the *Vernon machine as actually used.*

The fact that both the Dunkley and Vernon machines have made way for improved types of machines is of no significance. As said by this Court in *von Schmidt v. Bowers*, 80 Fed., 150:

“The contention on the part of counsel for the appellant that no successful machine can be built and operated in accordance with the complainant’s patents is not at all supported by the record, which contains abundant evidence to the effect that machines have been so built, and have ever since been operated with very great success. The fact, if fact it be, that the first machine built by the complainant (called in the record the ‘Davis Machine’) was not successful in operation, is unim-

portant. As well said by the court in answer to a similar objection in the case of *Mergenthaler Linotype Co. v. Press Publishing Co.*, 57 Fed., 502, 506:

"It would certainly be a novel doctrine to deny to an inventor the fruits of a broad invention because the machine which first embodied it was rudimentary in character, and failed to do as good work as improved machines made subsequently. None of the great inventors could survive such a test. Ten years after the invention of Howe, the machine first made by him would hardly have satisfied the least exacting sewing woman. The Dodds and Stephenson locomotive would, only a short time after its construction, have been discarded as behind the age, even by the savages of Tasmania. The telephone of Bell is not the perfected telephone of commerce. The Morse telegraph is looked upon to-day as an interesting antique. And yet it would be an unheard of proposition to withhold from these illustrious men the credit they deserve because their machines were crude at first, and were improved afterwards.'"

In order that this Court may fully appreciate the significance of the decision of the Court of Appeals of the District of Columbia in the *Dunkley v. Beekhuis* interference proceeding, we also annex, at the end of this brief, a copy of the opinion rendered in said interference by the Examiner of Interferences. The nature of the various decisions respectively rendered by the various patent office tribunals, is thus stated in the opinion of the Court of Appeals:

"The Examiner of Interferences differed with



the Primary Examiner and awarded priority to Beekhuis. On appeal to the Examiner-in-Chief this decision was reversed; one member dissenting. On appeal to the Commisisoner that decision was reversed, and priority awarded to Beekhuis."

## CONCLUSION.

It is quite apparent from the record herein that no act of S. J. Dunkley had the slightest effect on the development and progress of the peach peeling machine art. That art was developed in California. It reached its present state of perfection independently of anything done by Dunkley. He contributed absolutely nothing to the art. He trailed behind all the others in respect to every step taken in the art. He was the very last to take every step in advance. The Vernon machine was in successful, commercial operation before he ever thought of a peach peeling machine. Grier was using jets, under a 70-pound pressure, to remove the disintegrated skin, before Dunkley ever thought of a peach peeling machine. The Grier machines were in successful, commercial operation before Dunkley ever thought of a peach peeling machine. Before Dunkley even had completed, in 1904, his first commercial spray-brush machine, the art, in California, had progressed beyond the combined spray-brush machine and, in the 1904 season, the peach peeling machines used in California did not employ any brushes to assist in the peeling operation. As stated

before, Dunkley contributed absolutely nothing to the art and, therefore, the public owes him nothing.

We respectfully submit that the decision of the lower Court should be reversed and these suits ordered dismissed.

Respectfully submitted.

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COURT OF APPEALS OF THE DISTRICT OF  
COLUMBIA.*Dunkley v. Beekhuis.*

Decided January 6, 1913.

Mr. F. L. Chappell for the appellant.

Mr. L. S. Bacon, Mr. J. H. Milans, and Mr. T.  
Walter Fowler for the appellee.

SHEPARD, C. J.:

Appeal from decision of the Commissioner of Pat-  
ents in an interference proceeding.

The invention involved is a device for peeling fruit in which jets *or sprays* of water are employed as a means for performing the peeling operation.

The counts of the issue are four in number:

1. In an apparatus for treating fruit such as peaches, means for removing previously disintegrated skin from the fruit, including a support for the fruit, means for effecting a change of position of the fruit on said support, and means for directing peeling water jets upon said fruit.

2. In an apparatus for removing the previously disintegrated skin from fruit, the combination with means for supporting and advancing the fruit, of means for directing a peeling water jet upon said fruit as it advances.

3. In an apparatus for removing the previously disintegrated skin from fruit, the combination with means for supporting and advancing the fruit, of

means for directing peeling jets of water at intervals upon said fruit as it advances.

4. In an apparatus for removing the previously disintegrated skin from fruit, the combination with means for supporting and advancing the fruit of means for directing peeling jets of water at intervals upon said fruit from above and below as it advances.

All the tribunals of the Office found that Dunkley was the first to conceive and reduce to practice, provided he was entitled to make the claims of the issue, and this decision was undoubtedly right.

This presents the single issue of the case, and there is direct conflict in the decisions of the several tribunals passing upon it in succession. A motion to dissolve by Beekhuis on the ground that Dunkley was not entitled to make the claims, was referred, in the first instance, to the Primary Examiner and by him denied. The question was reserved and presented on the hearing. The Examiner of Interferences differed with the Primary Examiner, and awarded priority to Beekhuis. On appeal to the Examiners-in-Chief this decision was reversed; one member dissenting. On appeal to the Commissioner that decision was reversed, and priority awarded to Beekhuis.

The decision turned on the effect of the words "peeling jets of water," which are found in each claim. These words were first used in the claims of Beekhuis to whom patent issued pending the application of Dunkley, and his claims were copied by

the latter for the purpose of procuring the declaration of interference.

The common use of the peeling machine is the removal of the skin from peaches. Before introduction into either machine the fruit passes through a receptacle where it is subjected to a bath in a hot solution of lye, which disintegrates the skin and makes it readily removable. In Dunkley's device, the fruit from the bath is delivered on to an endless belt conveyor and passes between rotary brushes for about six feet. The brushes are in sections of fiber, and sponge. These revolve apparently at different rates, and rotate the peach as it is carried along by the conveyor-brush. Three perforated pipes are arranged along the passage—one at each side and one above—so that the jets or sprays of the nozzle perforations are directed against the line of passing fruit, striking the fruit tangentially and tending to impart a rotary movement to each as it advances in single file to the point of exit.

The Bekhuis machine has a large box-screen of wire mesh arranged so as to shake the peaches as they pass over it; the peaches having been submitted to the skin-disintegrating bath and cut in halves. Above this shaking-screen is arranged a water pipe at a distance of twelve or fifteen inches, with transverse slits at intervals, which deliver a broad fan spray or jet of water on to the fruit passing over the screen. Another pipe arranged below the screen delivers a

similar spray or jet upon the under side. The fruit is delivered by hand through a feed spout and falls in a mass upon the screen. There it is subjected to the water jets as it passes. The jets assist, and, doubtless, chiefly remove the disintegrated skin. They also cool the fruit after its subjection to the hot lye solution, wash it and prepare it for canning. The effect of the shaking in the box-screen is described as follows:

This agitation, shaking or dancing to which the fruit is subjected has the triple effect of, first, advancing the fruit to its discharge from the lower end of the box; second, of occasioning sufficient friction, both between the individual specimens themselves and between them and the screen bottom and sides of the box to assist in removing the skin; and, third, of presenting every portion of the fruit, at some time throughout the course of its travel, to the action of the water jets or sprays from the pipes 15 and 19. As the fruit travels through the box under the constant agitation of shaking described the water jets or sprays from below and above serve to fully remove the particles of skin.

The Commissioner was not satisfied with the evidence of Dunkley relating to the operation of his machine—which peeled peaches rapidly and satisfactorily—that the jets of water had anything more than a washing operation, and was of the opinion that this was all that Dunkley contemplated. It would be practically impossible for any witness to



testify to the actual fact that the skins were chiefly removed by the water jets in Dunkley's machine, for the reason of the rapid passage of the fruit and its concealment. Without pausing to discuss the criticism by each party of the jet or spray of the other, we think it apparent that the jet of Dunkley would have the effect to remove the skins as well as to cool and wash the fruit for the canning process. The skin of the peach having been disintegrated by the action of the hot solution of lye, that is to say, cut or broken and loosened from the pulp, was, to say the least, as easily removed by one jet as the other. But let it be conceded that Dunkley was not fully aware of the effective action of the jets of water and relied chiefly upon the action of the brushes to remove the skins; and, on the other hand, that Beekhuis relied chiefly on the water jets, yet the latter, as we have seen, relied upon the friction of the peaches with each other and the screen to assist in removing the skins, while the water jets had the additional function of cooling and washing the fruit. It is to be observed that none of the counts define the water jets as constituting the sole peeling means. The counts of the issue are satisfied by a construction in which peeling water jets enter into the operation of removing the skins whether they be exclusively employed to remove the skins or not. And in neither machine, as described and constructed, are the water jets shown to be the exclusive means of peeling. Since stress is laid upon the

words "peeling jets," it must be noted that no such words occur either in the specification, or the original claims of Beekhuis, whose application was filed May 25, 1904. They first occur in amended claims filed October 21, 1904, and were thereafter embodied in all of the allowed claims. As shown by the described and exhibited structures, both parties first subjected the fruit to the hot lye solution to effect the disintegration of the skin. Beekhuis agitates the fruit in his box-screen so as to partially peel it. Dunkley passes the fruit between his brushes to assist in peeling. Beekhuis subjects the fruit to the water jets or spray to "fully remove particles of skin," and for the purpose of "assisting in turning the fruit." Dunkley subjects each piece of fruit to jets of water from three pipes, which strike the fruit tangentially with sufficient power to turn it. These, with the brushes, remove the skins, and, being extended beyond the brushes, remove any remaining particles of skin. This is described as a "water brushing action." In both, the water serves to cool, wash and rinse the fruit and make it ready for canning.

We agree with the Primary Examiner and the majority of the Examiners-in-Chief that there is a great similarity in each application in so far as showing the functions performed by the water jets in the peeling operation; and that both parties are equally entitled to make the claims in interference.

A sufficient foundation for the claims is in Dunk-

ley's description to the effect that the peaches (after preparation) are delivered in single file line to a brushing and washing mechanism, which preferably comprises

a group of three long, perforated pipes for spraying water upon the moving line of peaches and subjecting them to *water brushing action*, an endless belt brush arranged between the two lowermost perforated pipes and operating to brush the peaches as they are rotated and to convey them along, and a pair of opposite rotating cylinder brushes operated both to rotate and brush the peaches, and having hollow perforated pipe cores for spraying the rotary brushes with water, and rotary cylindrical rubber sponge brushes, also having hollow perforated pipe cores for supplying the same with water; whereby the peaches may be very rapidly and cheaply and perfectly peeled without any waste or injury.

Again he describes the delivery of the line of peaches—

between water pipes and brushes of the washing and brushing mechanism by which the softened and loosened and shriveled skins of the peaches are removed, and the peaches thoroughly washed and freed from all taint or trace of the skin softening or loosening liquid. This washing or brushing mechanism comprises a group of, preferably, three water pipes G, having a series of perforations g, arranged to strike the peaches tangentially as they are conveyed along between the pipes.

And, again, the description says that the perforated water pipes extend beyond the rotary brushes, so that

the water spray may entirely free the surface of the peaches from any particle of skin or peel.

Dunkley was the first to invent and put into practice a rapid and effective machine for peeling peaches. This comprised in the combination the jets of water which he evidently realized aided in the removal of the skins when disintegrated by the alkali solution. That he did not realize the full extent of their agency cannot deprive him of the benefits accruing from their use.

His specifications and construction afforded sufficient foundation for the claims; and as he was the first to conceive the idea and reduce it to successful practice, he is entitled to the award of priority. The decision will, therefore, be reversed; and this decision will be certified to the Commissioner of Patents.

Reversed.

Final Hearing

Paper No. 66

October 3, 1910.

LBF

IN THE  
UNITED STATES PATENT OFFICE

*Dunkley vs. Beekhuis*

Patent Interference No. 30610.

MACHINE FOR PEELING FRUIT.

Application of Samuel J. Dunkley, filed November 29, 1904, Serial No. 234,715;

Application of Hermanus Albert Beekhuis, filed May 25, 1904, Serial No. 209,648, patented September 3, 1907, No. 864,944.

Messrs. Chappell and Earl, attorneys for Dunkley;  
Mr. Wm. F. Booth and Messrs. Bacon and Milans,  
attorney for Beekhuis.

This interference involves the application of Samuel J. Dunkley, filed November 29, 1904, and a patent No. 864,944, issued September 3, 1907, on an application of Hermanus A. Beekhuis, filed May 25, 1904.

The invention in controversy relates to a device for peeling fruit in which jets or sprays of water are employed as the means for performing the peeling operation. Devices of this kind are designed to operate on fruit, which has been previously subjected to a solution such as caustic soda, for the purpose of loosening and disintegrating the skin of the fruit. The fruit thus treated is caused to pass through the peeling apparatus, and during such passage the jets or sprays of water are directed upon the fruit so as to remove the skin which has been previously disintegrated.

The issue is defined in four counts as follows:

1. In an apparatus for treating fruit such as peaches, means for removing previously disintegrated skin from the fruit, including a support for the fruit, means for effecting a change of position of the fruit on said support, and means for directing peeling water jets upon said fruit.
2. In an apparatus for removing the previously disintegrated skin from fruit, the combination with means for supporting and advancing the fruit, of

means for directing a peeling water jet upon said fruit as it advances.

3. In an apparatus for removing the previously disintegrated skin from fruit, the combination with means for supporting and advancing the fruit, of means for directing peeling jets of water at intervals upon said fruit as it advances.

4. In an apparatus for removing the previously disintegrated skin from fruit, the combination with means for supporting and advancing the fruit, of means for directing peeling jets of water at intervals upon said fruit from above and below as it advances.

Both parties have taken testimony. The party Beekhuis is a patentee, but this fact entitles him to no additional advantage as regards the burden of proof, because his application was co-pending with that of Dunkley (*Paul v. Hess*, 115 O. G., 251).

The dates alleged in the preliminary statements of the respective parties are as follows:

	<i>Dunkley</i>	<i>Beekhuis</i>
Conception	August, 1902	July, 1903
Disclosure	Sept., 1902	July, 1903
Reduction to Practice	July, 1903	February, 1904

The testimony in behalf of Beekhuis shows that about July, 1903, he performed certain experiments in peeling fruit by the use of jets of water. Beekhuis testifies (Q. 10) that he used a hose to direct a jet of water upon peaches which had been treated with a skin disintegrating solution and that he discovered that the jets would perform the operation of



peeling the fruit. His testimony in regard to these experiments is corroborated by that of witnesses Fontana and DeRegt. These experiments apparently proved to Beekhuis that the idea of using jets of water for peeling the fruit was a feasible one. They do not show, however, that at this time, Beekhuis had a full conception of any mechanism by which this idea was to be carried into practical operation. In fact, Beekhuis practically admits (Q. 10, page 12) that he had no conception of any such mechanism when he states that the question of how to manipulate the fruit and use the water jets would have to be worked out. The testimony of the other witnesses is also deemed insufficient to show that Beekhuis had a conception of the invention in July, 1903, or at any time prior to the building of his first machine, which was in the early part of 1904. The testimony shows that this machine was completed about February 1, 1904, and was first successfully operated in the following summer. It is also clearly shown that said machine included the invention in issue, and its successful operation about June, 1904, entitled Beekhuis to that date for reduction to practice of the invention.

Dunkley claims to have conceived the invention in August, 1902, and to have reduced the same to practice by the construction of a peach-peeling machine in July, 1903. He also claims to have built a second machine of larger capacity in September of that year. It is unnecessary to consider the evi-

dence in regard to Dunkley's conception of the invention. If the machines above referred to contained the invention in issue and were actually built and successfully operated at the time alleged, it is clear that Dunkley is entitled to a reduction to practice of the invention prior to any date of conception satisfactorily established by Beekhuis.

The evidence is deemed sufficient to show that two peach-peeling machines were built by Dunkley at the time alleged. Dunkley himself testifies (Q. 17-20) that the first machine was built in July, 1903, and the second machine in September, 1903. He also testifies (Q. 50) to the effect that these machines were used to a considerable extent in peeling fruit for canning purposes during 1903, and that their operation was satisfactory. Witness M. E. Dunkley also testifies (Qs. 29, 40) in regard to the building and use of these machines in 1903, and his testimony corroborates that of the applicant Dunkley. The testimony of witnesses Wing and Newton is also to the effect that peach-peeling machines were built and used by Dunkley during the summer and fall of 1903. This evidence satisfactorily establishes that Dunkley built and successfully operated fruit peeling machines at least as early as the fall of 1903, and he is therefore entitled to that date for reduction to practice of whatever invention was included in these machines.

The question of whether or not Dunkley is entitled to make the claims in issue will now be considered.

In so far as the invention in issue is concerned, the machine described in Dunkley's application appears to be substantially the same as those shown to have been built by him in 1903. On behalf of Beekhuis, it is strenuously contended that the machines built by Dunkley did not involve the invention in issue and that he has not disclosed in his application any structure upon which the claims of the issue can be properly predicated. Dunkley insists that the invention was clearly included in his machines and is disclosed in his application and that he is therefore entitled to make the claims. It is clear that this is the pivotal question in the controversy. If Dunkley's early machines as described in his application involved the invention, he has shown reduction to practice prior to any established date of conception of his opponent, and Dunkley must therefore prevail. If his application does not disclose the invention, it is clear that Beekhuis is entitled to an award of priority.

*It appears from the record that more than a year after the grant of the patent to Beekhuis, Dunkley copied a number of claims from said patent and requested that an interference be instituted. After the interference was declared Beekhuis brought a motion to dissolve urging that Dunkley had no right to make the claims. The Primary Examiner granted the motion as to several of the counts but denied the motion as to those counts which constitute the issue of the*

interference. He held that the disclosure in Dunkley's application was sufficient to entitle him to make the claims of the issue.

Referring to the counts of the issue, it will be found that each one includes as an element, means for directing peeling jets of water upon the fruit. It is this element which is claimed to have been absent from the Dunkley machine and never disclosed in his application until after the issuance of the Beekhuis patent.

The expression "peeling jets" originated in Beekhuis' application and it will be well to first consider the Beekhuis machine in order to determine the significance of this expression. His machine includes a water pipe 19 which extends longitudinally above the screen over which the fruit advances. Another pipe 15 is similarly placed beneath the screen. These pipes are provided with transverse slits so as to furnish fan-shaped jets which strike the fruit in its passage over the screen. It is evident that these jets perform the principal part of the peeling operation. Beekhuis' specification states that as the fruit passes over the screen the friction between the individual specimens themselves and between them and the screen serves to assist in removing the skin, but such action is apparently only incidental. The jets of water are obviously the means principally relied upon in this machine for peeling the fruit as well as for washing away the disintegrated skin.

In the Dunkley machine the fruit is delivered to an endless conveyor brush by which it is carried between two parallel rotary brushes arranged so as to revolve transversely to the direction of travel of the conveyor brush. The rotary brushes as described in the application are composed of brush fibre for a portion of their length and of sponge rubber for the remainder thereof. Those shown in the exhibit, which is a section from Dunkley's second machine, are composed entirely of brush fibre. As stated by Dunkley in his testimony and as shown by the exhibit, the rotary brushes are about six feet in length. Dunkley also provides means for directing jets of water upon the fruit during its passage through the brushes, such means comprising three perforated pipes placed parallel to the rotary brushes and arranged, one above the line of travel of the fruit and the other two on either side of the conveyor brush.

It is Dunkley's contention that in his device the peeling operation is performed primarily by the jets of water and that the brushes are designed merely to rotate the fruit so as to present all parts thereof to the action of the jets. This is a theory of operation, which, it must be admitted, was not clearly and definitely set forth in Dunkley's original application. *On the contrary, his original idea seems to have been that the brushes were the means intended to peel the fruit and that the jets were provided in order to furnish water to clean the fruit and wash away the loos-*

*ened skin.* This is the idea which was persistently followed during the early prosecution of the case. The arguments and claims presented from time to time abound in expressions which indicate that the brushes were regarded as the means for peeling the fruit. A few instances of this may be pointed out.

In the argument filed April 14, 1905, it is stated that the rubber sponge brush has been found "peculiarly adapted to perform a certain function, portion or state of the work . . . *in peeling* the peach successfully." Present claim 3, submitted in December, 1905, contains the expression "*skin removing* and conveying brushes." Claim 2 submitted at the same time contains the expression "a *brushing mechanism for operating* on the *skins* of the peaches" and also the expression "means for spraying the peaches during the *brushing operation.*" Claim 16 in the same paper refers to "brushing mechanism for *removing the skins* of the peaches consisting of the combination of an endless belt conveyor brush and rotary brushes." A number of the claims which have been presented include spraying means for washing away the loosened skin in connection with the brushes for loosening and removing the skin. Some of the claims, however, omit all reference to spraying means including only the brushes as the means for peeling the fruit. An example of this is present claim 20 which reads as follows:



In a peach peeling machine, the combination of a tank wherein the skins of the peaches are loosened, stiff brushing devices for preliminary abrading or scouring such loosened skins, soft brushing devices for subsequently acting on such abraded skins to remove the same without injury to the pulp of the peaches, and means for causing the travel of the peaches through the tank and said brushing devices substantially as set forth.

It seems evident from the statements above quoted and many similar ones which might be cited, that Dunkley considered his machine as one in which the brushes performed the function of abrading and removing the skin and that the jets or sprays were intended merely as a washing means.

Furthermore, it is believed that prior to the time that the claims were adopted from the Beekhuis patent there was no statement in Dunkley's application which would clearly indicate that the jets would peel the fruit or that they were intended to perform this function. There are several expressions in the original specification, which, it is now insisted, furnish a basis for the claim that the jets in Dunkley's machine are "peeling jets" and that they operate in the manner set forth in the counts. One of these expressions is found on page 1 of Dunkley's application, about line 16, and is as follows:

"My invention consists in" . . . "a chute or device for delivering the peaches in single file line to a brushing and washing mechanism, and a

peach brushing and washing mechanism, preferably comprising a group of three long perforated pipes for spraying water upon the moving line of peaches, and subjecting them to water brushing action."

Also on page 4, about line 26, occurs the following expression:

"This washing or brushing mechanism comprises a group of, preferably, three water pipes G, having a series of perforations g arranged to strike *the peaches* as they are conveyed along between the pipes, and thus to impart to the peaches a rotary movement."

These expressions as well as the testimony make it clear that the jets were arranged so as to strike the fruit and the statement that the fruit was subjected to a "water brushing action" appears, when standing alone, to indicate that the jets were intended to perform the function of peeling the fruit. However, when this statement is considered in connection with the rest of the specification, it becomes very doubtful whether or not the jets would perform or were intended to perform any such function. Considered in the light of the rest of the specification, and of the amendments offered from time to time, a more reasonable interpretation of this language would appear to be that Dunkley's machine is a washing and brushing mechanism including as one element the pipes for spraying the water and that such element in connec-

tion with the brushes subjects the fruit to a water brushing action.

These statements in Dunkley's specification would be of far greater weight if there was anything in the record of his application prior to the beginning of this controversy which indicated that the jets were designed to accomplish any such function as that now ascribed to them. But when the record is examined, it is found that, for more than four years during which the application was prosecuted before the Office, Dunkley's machine was constantly and persistently referred to as a brush machine and there is not so much as a clear intimation to the effect that the jets or sprays were intended to perform the peeling operation.

A consideration of the machine or portion of a machine offered in evidence serves only to increase the doubts as to whether Dunkley's device would operate as it is now claimed it operates. *All of the brushes are composed of comparatively stiff fibre and the spray pipes are provided with small openings of about the size of an ordinary pin, these openings being spaced about an inch and a half apart along the length of the pipes.* As previously stated, the rotary brushes are about six feet in length and these brushes are designed to act on the fruit as it is carried along by the conveyor brush. These brushes, it is now contended, serve principally to rotate the fruit and that the jets perform the work of peeling the same. But

it seems unreasonable to suppose that the brushes in Dunkley's machine were designed primarily for the purpose stated. *On the contrary, it appears evident from an examination of the exhibit that the fruit would be subjected to a severe action by the brushes which would perform the principal work in removing the softened skin.* If the brushes are intended merely to rotate the fruit, it is not understood why the force exerted by the brushes in rotating the fruit would not also be sufficient to peel the same and why the jets would remove the skin which was unaffected by the stiff fibers of the brushes. It is true that the spray pipes in Dunkley's machine are near to the fruit but the jets are small and it is not believed that the mass of water in these jets would be sufficient to have any appreciable action in removing the skin which had resisted the peeling action of the brushes as they rotated the fruit. *It seems apparent, therefore, that Dunkley does not rely upon jets of water as the principal means for peeling the fruit but that his machine, as repeatedly stated in his record, is one in which the brushes remove the skin which is subsequently washed away by the jets or sprays.*

The evidence offered in behalf of Dunkley as to the mode of operation of his machine may now be examined. Dunkley himself testifies that the machines were meant to peel the fruit by means of jets of water and witnesses M. E. Dunkley, Verhage and Wing, have also testified to the same effect. All this

testimony, however, appears to be based entirely on theory, and no facts are given to substantiate the statements of the witnesses. The inventor Dunkley states (Q. 50) that a peach could be run through the machine with the brushes removed and would be perfectly peeled, but later he practically admits (XQ. 227, 228) that he has never tested the action of his machine in this way. He also admits (XQ. 229) that the use of the brushes has never been discontinued. When cross-examined, Dunkley repeatedly stated that the fruit passes through his machine so rapidly that it is impossible to determine just what action takes place (Dunkley, XQs. 119, 197, 199, 200, 252). It would appear, therefore, that Dunkley's testimony in regard to the action of the jets, must be based entirely upon his opinion as to what takes place in his machine. In fact, he admits (XQ. 199) that part of his testimony as to movements of the fruit was purely an assumption on his part.

Witness M. E. Dunkley on direct examination states (Q. 35) that the movements of the fruit are so rapid that it is difficult to describe the effect of the jets of water. On cross-examination he admits (XQ. 132) that it is practically impossible to determine just what is the individual action of the various elements in the Dunkley machine. Apparently then his testimony to the effect that the jets of water serve to tear the skin from the fruit amounts to nothing more than

an opinion on his part as to the manner of operation of the machine.

While witness Verhage states that the perforated pipes did the peeling of the fruit, he admits (XQ. 150) on cross-examination, that the operation of the machine is so rapid that it would be impossible to definitely state the action of the various elements, and he also admits (XQ. 153) that Dunkley's machine would be correctly described by stating that it was one in which brushes were provided for loosening and removing the skin and sprays of water for washing away the removed skins. The testimony of witness Wing is indefinite and contradictory. It is difficult to gather from her statements just what she regarded as the operation of the machine. At some places she states that the brushes were intended to take the paring off the fruit and at others that the jets performed this function (XQ. 49; RDQ. 50; RXQ. 54). However, it is apparent that this witness knew very little as to the structure of the machines and her testimony as to their mode of operation can be given little weight.

Taken as a whole, the testimony fails to clearly and definitely establish that Dunkley's machine will operate in accordance with the theory now advanced by him. There are not facts set forth from which the operation of his machine could be definitely determined and practically all of the testimony on this



point amounts to nothing more than conclusions on the part of the various witnesses.

It follows, therefore, from all that has been said that Dunkley has failed to show that his device will perform the operation of peeling fruit by means of jets of water. The reasons for this conclusion may be restated briefly. Dunkley's specification does not clearly describe any such action by the jets in his machine and nothing occurred during the early prosecution of his application to show that any such action was ever contemplated. The machine offered in evidence would apparently not operate in the manner now claimed, and the testimony that this machine, or that of the application would so act, amounts only to an expression of opinion by the witnesses, there being no established facts on which said testimony is based.

Under the circumstances of this case, it was incumbent upon Dunkley to show very clearly that his device would operate in accordance with the new theory adopted by him after the issue of the Beekhuis patent. He has failed to do this and it must, therefore, be held that the machine described in Dunkley's application does not contain means for directing peeling jets upon the fruit, and that he is not entitled to make the claims constituting the issue of this interference.

Priority of invention of the subject-matter in

issue is accordingly awarded to the senior party,  
Hermanus A. Beekhuis.

Limit of appeal: December 29, 1910.

H. E. STAUFFER,  
Examiner of Interferences.

December 9, 1910.

